

The Optimal Law Enforcement with Mandatory Defendant Class Actions

Introduction

The mass production society has evolved with great intensity since the enormous progression of the communications network, especially the Internet, providing services and goods (tangible and intangible) to hundreds of millions of people.

The 21st century conceives a high technology society with a permissibility of massive unlawful behavior. The broad range of relationships set through the Internet and other communications systems, sometimes agglomerating millions of people, allows a very considerable number of transgressions of the law.

With such a scenario as a backdrop we are aiming at analyzing the law enforcement system and the optimal mechanism to prevent and redress harms in the mass information society by optimal deterrence, insurance and redistribution by means of mandatory defendant class actions.

The article also addresses one of the most problematic issue related to defendant class actions: the reluctance of the respondents to assume class representation and the absence of an appropriate legal fees mechanism to motivate defendant class lawyers.

Our premise is that individuals are rational, meaning that they seek their maximum welfare. Hence, the ideal legal system should improve individuals' well-being by minimizing the costs of accident risk. This task is best achieved by compulsory aggregation of claims and defenses. The latter with incentives to encourage the use of defendant class actions by the plaintiffs' bar, but also by the defendants, in order to exploit scale of investment and economy in common questions of the class defense.

We urge that the access to justice has to step forward into a combined strategy of the substantive law and the procedural law by a collective litigation. This shall be developed on the respondents' pole perspective and under a theoretical frame to attain optimal individual well-being and, consequently, a general social welfare.

Concerning with mass production accidents, the doctrine are used to consider the victims' angle, therefore, the plaintiffs' side in litigation. This happens because, commonly,

the liability remains on the enterprises that create the risk and are responsible for the accidents due to: defective design of products; hazardous safety measures for employees; unhealthy environment for the population; and so long.

However, our approach is on the defendants in order to resolve, once and for all, common questions within the defenses of the multitude of respondents to a lawsuit. Although defendant class action has shown to be a very useful procedure for the plaintiffs, it is important to demonstrate that it is also a functional device for the defendants. As we have mentioned, the aggregation of defendants and defenses makes everyone better off, being the defendant class action an essential legal instrument for the optimal law enforcement.

The objective of this article is to enhance the law enforcement by mandatory aggregation of defendants and improvement of the mechanism to incentivize the class lawyer.

In Part I, some examples of conflictual relationships that arise out of the knowledge society are selected and then briefly analyzed through different litigation strategies.

First, under an individual litigation, *i.e.*, on case-by-case lawsuits; second, by bringing lawsuits against parties hold responsible for secondary liability on a theory of contributory or vicarious infringement; and third, in a defendants' aggregative system.

Part II depicts the normative theory of individual rational choice that achieves the optimal law enforcement system. It maximizes the individuals' well-being putting everyone behind a veil of ignorance. In this sense, it requires legal procedures mandating aggregation of claims and defenses.

In Part III we summarize an explanatory view of the defendant class actions, its origins and the requisites for its certification and maintenance under the current federal statute.

Part IV analyzes the optimal aggregation of defendants. With this objective, we examine the advantages of exploiting investment and economy scale through aggregation of defenses.

Also, we challenge the assertion that the value of a day in court is antagonist to mandatory class action, with the argument that individuals' well-being is attained by representative suits.

Moreover, we demonstrate that the defendant class actions are a legal device that, while enhances everyone's welfare, is useful for plaintiffs' bar as well as for defendants, working as a protective device against threats of nuisance value suits.

In addition, we procure to furnish the appropriate incentives for aggregation of defendants by adequate attorney fees methods. With a propositional approach, we compile the actual methods to grant attorney fees in class actions and its application to the defendant class counsel.

I. The 21st Century Mass Society

The idea of "mass society" has evolved in time. Firstly, it reflected the beginning of the industrialization in the 18th century, when the transformation of the means of production from artisanal craftwork to large scale machinery work, forged the concept of mass production (of tangible goods). Since, the notion of "mass society" is part of the collective conscience.

However, in the 21st century, we are living in an information society, where furnishing services and goods are made by sophisticated communications links, especially by Internet. In addition, many tangible goods are now intangible (for example, a book can be obtained by downloading a program by Internet and be read without being touched, with no physical contact, just rolling the computer bar); business are faster celebrated with new ways of expressing consideration; and, parties are located anywhere in the world.

In like degree, it is quite fair to say that one of the most extraordinary advancement in the contemporary society has been the creation and diffusion of the Internet. To have an idea of the immeasurable growth of the users of the Internet is enough to reveal that in the United States, in four years, it has reached the number of 50 millions while to get this number, television took 13 years, personal computer 16 years, and the radio 38 years.¹

¹ Data obtained from the "Sociedade da Informação no Brasil - Livro Verde", 3 ("Information Society in Brazil - Green Book"). This study is the result of the work developed by the Brazilian Science and Technology Ministry containing the goals for the implementation of the Information Society Program and is formed by a consolidated summary of the applications of the information technologies.

The possibility of people to communicate to each other, from a computer connection, to access banking data, or, to accomplish business all over the globe, is a phenomenon of integration and development of the civilization.

The so-called “information society” resemblances the new face of the “mass society”. It generates a new step in the relationship among nations, influencing political and economical systems and even the sovereignty of each the people. In Brazil, for example, the Information Society Program intends to impose a shared responsibility among private initiative sectors (entrepreneurial and civil society) and the public sector, aiming at “integrating, coordinating and incentivizing actions for the use of communication and information technologies as a mean to contribute to the social inclusion of all Brazilian citizens in the new society and, at the same time, to contribute to the country economy to gain conditions to compete in the global market”.²

To that extent, the great challenge is to make use of the advanced communication knowledge and the Internet to promote the enrichment of the modern culture under a human and ethic perspective and not just to employs it as a technological device, without aggregating better life conditions to the entire information society.

Lawyers, judges, public prosecutors, in summary, the whole legal community much more than being alert to the mentioned advent, shall act affirmatively, proposing changes, trying to furnish normative elements for the relationships created by this new “mass society”.³

Consequently, the random offer of goods and services to hundreds of thousands of people induces lawful and unlawful behaviors. For instance, satellite television network: one may assume that most of the consumers act in a proper manner paying for the service; nonetheless, others may utilize some sort of gadget in order to receipt the transmission without retribution. Similarly, downloading music and films by the Internet: some users will pay for obtaining the music and films and others will simple infringe the copyrighted works.

² “Sociedade da Informação no Brasil - Livro Verde”, 10.

³ I use the locution “legal community” to express a broader meaning than “law operators”, *i.e.*, lawyers, judges and public prosecutors. Referring to “legal community” one may include a person or an entity that is direct involved with and influenced by any specific domain or area of the law. For example, tenants in general are part of the legal community regarding proposed legislation that may interfere with their lease agreements.

In this sense, there is a substantial modification on the law enforcement that has to be realized by the law operators and a choice of solutions to be made in order to achieve the optimal enforcement level.

On one hand, there is the possibility to file lawsuits separately, one by one, against individual wrongdoer. Is easy to verify that this path, not even by far, accomplish the objectives of compensation and deterrence of the law.

This strategy has been largely employed by DirecTV, a company that broadcasts television programs through satellite transmissions. The satellite technology used by DirecTV requires the installation of a satellite dish, an integrated receiver/decoder and an access card.

DirecTV had sent thousands of letters to persons alleging that they would be stealing the company's satellite signal by using modified DirecTV access cards ("smart cards") and offered a settlement agreement.⁴ The smart cards are said to be a device that may be used in legal and meaningful purposes.⁵

In addition, DirecTV has created an Internet site that "provides information concerning civil actions brought by DirecTV against those who fraudulently obtain DirecTV programming without authorization by and proper payment to DirecTV or illegally design,

⁴ The settlement agreement inserted in the "cease and desist" letters consisted of: "(1) surrender illegally modified Access Cards or other satellite signal theft devices in your possession, custody or control; (2) execute a written statement to the effect that you will not purchase or use illegal signal theft devices to obtain satellite programming in the future, nor will you have an involvement in the unauthorized reception and use of the DirecTV's satellite television programming; and (3) pay a monetary sum to DirecTV for your past wrongful conduct and the damages thereby incurred by the company", *see*, <http://www.directvdefense.org/files> (last visited in March 17th, 2006).

⁵ "Smart cards are an important, and legal, branch of emerging technology, but satellite TV giant DirecTV has launched a legal campaign that threatens smartcard researchers and innovators. Over the past few years, the company has sent hundreds of thousands of demand letters and filed nearly 24,000 federal lawsuits in response to the mere purchase of smart card readers, emulators, unloopers, reprogrammers, bootloaders, and blockers. The satellite TV company accuses techies – some of whom threw out their televisions in favor of the Internet long ago – of using these devices to illegally intercept its signals. But the smart card readers and their various derivatives are capable of so much more: they secure computer networks, enable user-based identification, and further scientific discovery. People who intercept DirecTV's satellite signal are breaking the law. However, DirecTV's cease and desist letter campaign does not distinguish the legitimate users from the thieves. This website is meant as a legal resource for the legitimate computer scientists, technology workers, and hobbyists who are being harassed by DirecTV's no holds-barred slash-and-burn legal strategy. This site provides scientists, researchers, innovators and their lawyers with the resources necessary to fight DirecTV and protect their right to own and use multi-purpose technology for its legal applications – and without fear of reprisal", *see*, <http://www.directvdefense.org/> (last visited in March 17th, 2006).

manufacture, market, sell, or use devices that allow access to satellite signals without payment to DirecTV”.⁶

According to the referred site, over 25,000 individuals had been suited for fraud and piracy in violating television satellite signal. One can realize that this is a small number comparing with the estimate for this year that the number of violators of DirecTV’s signal may reach 3.3 million people, according to the Carmel Group, a communications-consulting firm, cited by Forbes Magazine journalist, Dorothy Pomerantz.⁷

On the other hand, the ideal solution is to aggregate all claims and defenses, so uniting plaintiffs and defendants in collective litigation.

In some instances, litigation direct to the commonly called “gatekeepers” may be the ideal solution to resolve the conflict over an unnumbered parties.⁸ The procedure is to bring a lawsuit against persons or entities that furnish the market with the resources that allow the wrongful behavior.

Considering the previous examples, the suit is to be filed against hardware manufactures and or computer technicians that develop and produce tools enabling unauthorized satellite television transmission. In the second case, the action is brought against the enterprises that provide file sharing services through peer-to-peer network (“p2p”) or freely distribute software that permits downloading copyrighted works through the Internet without any retribution to the copyrights’ holders.⁹

⁶ <http://www.hackhu.com>, last visited March 17th, 2006.

⁷ *Stealing the Show*, available at http://www.forbes.com/2003/05/29/cz_dp_0529directv.html, (last visited in March 17, 2006).

⁸ The strategy of enforcing the law against the “gatekeepers”, as third-party liability, is fully discussed in Reiner H. Kraakman, *Gatekeepers: The Anatomy of Third-Party Enforcement Strategy* 2 J. L. Econ & Org. 53 (1986); *Corporate Liability Strategies and the Costs of Legal Control*, 93 Yale L. J. 857 (1983-1984). See, also, Assaf Hamdani, *Gatekeeper Liability*, 77 Cal. L. Rev. 53 (2003-2004). For the view of the plaintiffs’ attorneys as the system’s gatekeepers, see, David Rosenberg, *The Casual Connection in Mass Exposure Case: a “Public Law” Vision of the Tort System*, 97 Harv. L. Rev. 849, 889-92 (1983-1984); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L. J. 561, 574-5 (1986-1987).

⁹ See, *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005); *In re Aimster Copyright Litigation*, 334 F. 3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

In one of the most recent case, the Supreme Court held companies secondary liable on the theory of contributory and vicarious infringement because they provided software to consumers that use them to violate copyrighted works:

“The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast’s and Grokster’s software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F.3d 643, 645-646 (CA7 2003). One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307 (CA2 1963)”.¹⁰

Notwithstanding, our focus is in an alternative for law enforcement in the information society: the defendant class action.¹¹

The option for defendant class action takes into consideration the deterrence function of the law and civil as well as its insurance objective. As a result, the ideal of distributive justice is better served. The procedural law has to be seeing as a tool to achieve the principles enacted in the substantive law.¹²

Regardless of the eternal debate concerning the distinction between substantive law and procedural law, which is beyond the objective of this work, it is important to realize that the science of law has for a long time matured and does not considered any longer the

¹⁰ *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764, (2005)

¹¹ See, Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 Conn. L. Rev. 1239, 1239-40, 1254-6 (2000-2001) (analyzing the mass tort in the 21st century and reinforcing the use of class actions).

¹² See, Part II, *infra*.

procedural law an appendix of the substantive law, or even, a domain of law that has an end on its own.¹³

Procedural law has to be applied in order to carry out the objectives of the substantive law. The legal process is the instrument to perform the goals of social's peace, equality and welfare that are within the principles of the substantive law. Hence, using the tools that are provided by legal proceedings shall not be considered as violating the Rules Enabling Act¹⁴ or the Rule 82 of the Federal Rules of Civil Procedure.¹⁵

We urge that the access to justice has to step forward into a combined strategy of the substantive law and the procedural law by a collective litigation developed on the respondents' pole perspective and under a theoretical economic feature to attain optimal individuals' well-being.¹⁶

¹³ For further discussion about the distinction between substantive law and procedural law, *see*, generally, Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333 (1932-1933) (discussing that the purpose of the characterization is the element for distinguishing a law as substantive or procedural); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47. S. Cal. L. Rev. 842 (1973-1974) (discussion within consumer class action context; starts from an analysis of *Sibbach v. Wilson & Co.* (312 U.S. 1 - 1941) and *Hanna v. Plumer* (380 U.S. 460 - 1965), and proposes a "widespread publicly controversy" test to define the substantive or procedural nature of the statute); Carole E. Goldberg, *The Influence of Procedural Rules on Federal Jurisdiction*, 28 Stan. L. Rev. 397 (1975-1976) (criticizing, in the class action context, the decisions in *Snyder v. Harris* (394 U.S. 332 - 1969) and *Zahn v. International Paper Co.* (414 U.S. 291 - 1973) that did not permit that procedural changes influenced jurisdictional decisions, and, suggesting that a procedural rule is consistent with the provisions of the Rule 82, of the Fed. R. Civ. P., solely if it has a procedure purpose which implementation is not barred by a jurisdictional rule); Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 Duke L. J. 281 (1989) (discussing an ambivalent nature, substantive-procedural, of the statutes of limitation); Elizabeth Barke Brandt, *Fairness to the Absent Members of a Defendant Class: a Proposed Revision of Rule 23*, 1990 BYU L. Rev. 909 (1990) (criticizing the decision in *United States v. Trucking Employers Inc.* (72 F.R.D. 98 - 1976) that allowed certification of class action with expansion of jurisdiction and venue, therefore, violating the Rule 82, of the Fed. R. Civ. P).

¹⁴ 28 U.S.C.A. § 2072. **Rules of procedure and evidence: power to prescribe.**

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c) Such rules may define when ruling of a district court is final for the purposes of appeal under section 1291 of this title.

¹⁵ Fed. R. Civ. P. **Rule 82. Jurisdiction and venue unaffected.**

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as civil action for the purposes of Title 28, U.S.C. §§ 1391-1392.

¹⁶ This position advances the three "waves" for the access to justice generated from the meticulous world survey concerning that matter, chiefly organized by Professor Mauro Cappelletti, by reinforcing that the distributive

We aim at demonstrating that the defendant class action is the law enforcement mechanism that obtains the individual welfare under both *ex ante* and *ex post* perspectives.¹⁷

Distinguishing wrongdoers from the law-abiding public, the defendant class action operates a deterrence effect impeding the under-deterrence that occurs when the mentioned difference is not made.

Assuredly, the lack of distinction induces and awards the illegal conduct, as the wrongdoers are certain that they are not going to be prosecuted. Their harm is not redressed.

The collectivized litigation resolves, once and for all, all common questions involving claims, issues and defenses, optimizing investment in precautionary measures to perform the best deterrence and enhancing judicial and process resources resulting in the ideal compensation.¹⁸

In addition, from the sole perspective of the aggregation of the wrongdoers, the class action procedure, confers multiple defendants economy of scale for the litigation, consequently, the advantage for exploiting it to maximize their resources in common defenses, achieving the desired *ex post* litigation status.

The early lesson of Justice Oliver Wendell Holmes questioning how much it is desirable to the public to insure the safety against liability is still updated.¹⁹

The answer that we advocate is of an ideal model of law enforcement system that grants everyone the best well-being, before and after the fact of a given situation, due to optimal deterrence of unreasonable risks, optimal insurance of reasonable risks, and optimal redistribution of wealth by progressively funding the preceding twølements .

justice demands joint theoretical and pragmatocal application of substantive and procedural laws. *See*, Mauro Cappelletti and Bryant Garth, *Access to Justice. A World Survey*, 5-124 (Milan: Dott. A. Giuffrè Editore, 1978.Vol. I, Book 1).

¹⁷ *See*, Part II, B, *infra*.

¹⁸ *See*, Part II, C, *infra*.

¹⁹ “Our law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy to-day are mainly the incidents of certain well known business. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability, if pressed far enough is really the question how far it is desirable that the public should insure the safety of those whose work it uses”; Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

II. The Normative Theory of Individual Rational Choice

A. Introduction

The premise of our analysis is that the defendant class action is an important legal instrument to enforce the law, and as a consequence, requires incentives to be optimally employed.

In accordance, despite of the fact that collectivized litigation had majorly being considered under the plaintiffs' perspective by the statutes, the authorities and the academics, it is undeniable that the aggregation of defenses is a powerful device. For that reason it should not be disregarded to be contemplated globally with the plaintiffs' class action in the effort of enhancing optimal law enforcement.

It is important to note that the aggregation of defendants may serve the interests of the plaintiff, because ordinarily it is the plaintiff whom requires the certification of a defendant class, but the defendant class action also operates on behalf of the defendants.²⁰

The justification of our proposition is based on the argument that individuals are rational, meaning that they seek their maximum well-being. Hence, the ideal legal system should improve individuals' welfare by improving the law enforcement. As a consequence, optimal social welfare is accomplished. This task is best achieved by aggregation of claims and defenses, the latter with incentives to encourage the use of defendant class action.²¹

²⁰ See, Part IV, *infra*.

²¹ Much of the text developed here is based upon on Professor David Rosenberg's theory of mass tort law enforcement, presented throughout several works: David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. Chi. Legal F. 19 (2003); Charles Fried and David Rosenberg, *Making Tort Law: What Should be Done and Who Should do It* (The AEI Press, 2003) (cited hereafter as Fried and Rosenberg, *Making Tort Law*); David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 Harv. L. Rev. 831 (2002); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 Va. L. Rev. 1871 (2002); David Rosenberg, *Mass Tort Class Action: What Defendants Have and Plaintiffs Don't*, 37 Harv. J. on Legis. 393 (2000); Bruce L. Hay and David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377 (2000); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass Exposure Cases*, 71 N. Y. U. L. Rev. 210 (1996); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B. U. L. Rev. 695 (1989); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 Ind. L. J. 561 (1986-1987); David Rosenberg, *The Casual Connection in Mass Exposure Case: a "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849

Regardless that the theory is methodologically developed in relation to tort law, it is a normative theory of rational individual choice concerning law enforcement, and so the word “accident” may and is employed in a broader sense of wrongful conduct violating the law.²²

Economists refer to this method of policy assessment dependent on individuals’ well-being as welfare economics, as explained by Professors Kaplow and Shavell:

“The welfare economic conception of individuals’ well-being is a comprehensive one. It recognizes not only individuals’ level of material comfort, but also their degree of aesthetic fulfillment, their feelings for others, and anything else that they might value, however intangible”.²³

We are employing an operational, functional method of study, based on an economic analysis of the defendant class action, so we find important to expunge the myth that economics deals with money: it is related to resources, its uses and scarcity.^{24 25}

(1983-1984); David Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market*, Harvard Law School, Public Law Research Paper no 44 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354100.

²² *Mutatis mutandis*, see, Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970) (cited hereafter as Calabresi, *The Costs of Accidents*). See, also, David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 920 n. 12 (1997-1998) (stating that the distinction between tort and contract is hard to draw because the former often arises in context of contractual arrangement, justifying the inclusion of the latter, for analysis of class action, in the same category of the torts).

²³ Louis Kaplow and Steven Shavell, *Fairness versus Welfare*, 114 Harv. L. Rev. 961, 968 (2000-2001).

²⁴ Richard Posner, *Economic Analysis of Law*, 6 (Aspen 2003) (cited hereafter as Posner, *Economic Analysis of Law*); *Some Uses and Abuses in Economics in Law*, 46 Chi. L. Rev. 281 (1978-1979).

²⁵ For precursors works about the economic analysis of the law, see Guido Calabresi, *Some Thoughts of Risk Distribution and the Law of Torts*, 70 Yale L. J. 499 (1960-1961); *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970) (cited hereafter as Calabresi, *The Costs of Accidents*); and, R. H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960). For some major modern works, see Posner, *Economic Analysis of Law*, 3-16 (cited in note 21); William M. Landes and Richard A. Posner, *Joint and Multiple Tortfeasors: an Economic Analysis*, 9 L. Legal Stud. 517 (1980); Steven Shavell, *Foundations of Economic Analysis of Law*, 1-5 (Harvard University Press 2004) (cited hereafter as Shavell, *Foundations of Economic Analysis of Law*); Steven Shavell, *Economic Analysis of Accident Law*, published in John M. Olin Center for Law, Economics and Business, Harvard Law School, Discussion Paper Series No. 396, available at http://law.harvard.edu/programs/olin_center; Kaplow and Shavell, 114 Harv. L. Rev. 961 (cited in note 20); A. Mitchell Polinsky, *An Introduction to Law and Economics* (Aspen 2003).

In addition, we are aware of some contention on the economic approach of the law, however, a defense of its appropriateness is without the scope of this work.²⁶

We simply argue that questions, for instance, concerning the morality of compensation with money damages for the contraction of asbestoses, or, about the justice of taking the doctor's eye to redress the patient's loss of an eye due to medical negligence, are meta-judicial, in our view, and so far, they are out of the range of our article.

The economic perspective applied herein does not serve any ideology; there is no intention to approach the substantive law in a critique manner. The normative description of the law is a meta-discussion in relation to the optimal enforcement system under an economic perspective.

B. The social welfare and the *ex ante* and *ex post* perspectives

Imagine the following scheme where a driver is preparing for a car trip and has to choose between two different roads. The first highway has a toll that charges ten dollars per automobile. The price of the toll is justified to fund the cost of several safety features such as new pavement; four paths; wide paths; hard shoulders; night illumination; assistance phones every five miles etc. The second one does not charge a toll fare, but the pavement is old and in some places it is ruined, there is only one path to go and another to comeback; the path is narrow; there is no assistance phone etc.

²⁶ We referred the interested reader in a critique of the economic analysis of the law to: Athur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451 (1974) (argues that Posner's theory belongs to the American Legal Nominalism, which bestows on circular vicious rationale concepts that neither consider arbitrary normative propositions of Formalism or empirical propositions of Realism, and can not adequately analyzes human activity); *Law and*, 87 Yale L. J. 989 (1977-1978) (a broader critique to the possibility of a scientific analysis of the law); Edward J. Bloustein, *Privacy is Dear at any Price: a Response to Professor Posner's Economic Theory*, 12 Ga. L. Rev. 429 (1977-1978) (criticizing Posner's theory of privacy for being simplistic and, therefore, rather avoiding than confronting the complexity of the legal rules); Ronald Dworkin, *Why efficiency? A response to Professors Calabresi and Posner*, 8 Hofstra L. Rev. 563 (1979-1980); *Is Wealth a Value?* 9 J. Legal Stud. 191 (1980) (affirming that "the descriptive claims of economic analysis as they have so far been presented, are radically incomplete"); Anthony T. Kronman, *Wealth Maximization as a Normative Principle*, 9 J. Legal Stud. 227 (1980) (arguing that wealth maximization is an absurd principle and an unsound ideal); Gary Minda, *Toward a more 'Just' Economics of Justice – a Review Essay*, 10 Cardozo L. Rev. 1855 (1989); Robin West, *Authority, Autonomy, and Choice: the Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 Harv. L. Rev. 384 (1985).

Assuming that individuals are rational and, hence, seek to maximize their well-being, the driver will prefer to take the best road aiming to avoid any accident. In accordance to this rationale, this is a decision that he makes *before* traveling. Before traveling the driver will choose the safety road instead of the unsafety one, even though he has to pay a ten dollar toll fare.²⁷

“Behind a veil of ignorance” – expression created by the juris-philosopher John Rawls – our driver would prefer to pay the toll to use the best road. He changes his option after being certain to have made a secure trip.²⁸

In accordance to John Rawls theory, people in the original position are behind a veil of ignorance so that any principles agreed to will be just. The only particular facts parties know are that their society is subject to circumstances of justice whatever it implies, and, general facts that affect their choice of the principles of justice. No considerations of concept of justice can be advanced unless it is a rational one, supplementing the lack of knowledge of the original position. The evaluation of principles is made in harmony to its general and public recognition and universal application because it will be complied by everyone. And a rational deliberation, assuming certain conditions and restrictions, reach a certain conclusion as that a certain concept of justice would be chosen in the original position. However, the original position is not an original pact or agreement; it is one that, under certain conditions and restrictions, anyone in anytime can adopt its perspective. And these requirements are the veil of ignorance.²⁹

The evolution of John Rawls’ thoughts merged his comprehensive liberal theory into a political conception of justice and fairness. He reinforced the idea of the veil behind ignorance where the parties are rational, distinguishing rationality from reasonableness and from special

²⁷ Throughout this article we are going to use masculine pronouns for generic reference and not in a gendered sense.

²⁸ *A Theory of Justice*. Cambridge: Harvard University Press, 1999. Working on welfare economics and theory of risk-taking, John Harsanyi had reached similar conception, approximating cardinal utility function (marginal utility of money) in both systems. Giving individuals an “equal chance of being ‘put in the place of’ any particular member of society” maximizes cardinal utility function for both welfare economics and theory of choices involving risk, as they both are based on this same principle of equal chance without previous knowledge of fate (John C. Harsanyi, *Cardinal Utility in Welfare Economics and in Theory of Risk-Taking*, 61 Pol. Econ. 434 (1953).

²⁹ *Id.*, 118-123. For a critique of the theory of rational behaviour and the response thereto, see, Rosenberg, 2003 U. Chi. Legal F. 19, 25 n. 13 (cited in note 21).

psychologies like envy and spite. Rationality is understood in an economic way thus the parties can rank their final ends consistently. In order to establish the concept of justice as fairness, Rawls enumerate a list of five primary goods to north the parties as they are behind the veil of ignorance, which prevents them from knowing the doctrines and conceptions of goods of the persons they represent.³⁰

The choice an individual makes in order to maximize his well-being is sensibly different when he knows, or, does not, the situation yet to come. Arguing that individuals are rational, meaning that they seek their maximum well-being, the ideal legal system should augment individuals' welfare by minimizing the sum of accident costs, what is optimally obtained with the reinforcement of the legal mechanism for aggregation of claims and defenses. Consequently, optimal social welfare is obtained. Somewhat accounting on these premises, Professor Rosenberg states:

“My argument proceeds from the premises that the legal system should aim to improve individuals' well-being and that individuals seek to maximize their own welfare. In short, in the face of accident risks, the legal system should do what an individual seeking maximum welfare would prefer. To explain what such a legal regime would look like, I adopt and justify the “ex ante” perspective, which places individuals “behind a veil of ignorance”, without information about their particular situations in the “ex post” world to come of accident risk and scarce resources”.³¹

The rational individual makes different choices whether he is facing an uncertainty or a certainty state of the world. Putting in other words, there is a sensible difference on an individual choice between two states of the world: before and after a certain situation.

³⁰ *Justice as Fairness. A Restatement*, 87-8 (Cambridge: Harvard University Press, 2001). The goods, as things that political citizens need, being free and equal persons living a complete life, are: (i) the basic rights and liberties: freedom of thought and liberty of conscience; (ii) freedom of movement and free choice of occupation against a background of diverse opportunities; (iii) powers and prerogatives of offices and positions of authority and responsibility; (iv) income and wealth; and, (v) the social bases of self-respect. *Id.*, 58-9.

³¹ Rosenberg, 115 Harv. L. Rev. 831, 840 (cited in note 21); Rosenberg, 88 Va. L. Rev. 1871, 1879 (cited in note 21); Rosenberg, 71 N. Y. U. L. Rev. 210, 252-7 (cited in note 21).

Now consider the same individual *after* the trip in our example. Contrary to his *ex ante* choice, after performing a secure trip, the driver would prefer to save the toll money and travel throughout the unsafety highway. Discovering his fate - “the luck of the draw” - the individual change his option and disregards of the optimal system legal system, *e.g.*, the driver does not care anymore to fund the cost for the best highway for everyone; *ex post*, he cares only about his self-interest of saving the toll money.

“Crucially, *ex ante* and *ex post* preferences are mutually exclusive concerning the fundamental purpose of the legal system in managing accident risk. *Ex ante*, before knowing the relevant accident and legal fates, individuals would rationally prefer a legal system that promotes the collective interest in minimizing the sum of accident costs, particularly through optimal precautions, insurance, and redistribution. In contrast, *ex post*, after knowing the ‘luck of the draw’, individuals rationally prefer a legal system that promotes their separate interests regardless of the consequences of minimizing total accident costs (...).³²

Accordingly, the mutually exclusive preference is made between a world of “uncertainty”, *ex ante*, before the fact, and, another made after the fact, *ex post*, under a “certainty” of the state of the world. The individual’s response is absolutely contrary in each one of these situations. Before knowing the future, the fate, the accident, he chooses a secure highway in order to prevent any accident; after the safety trip, he would have chosen to have saved the toll money and to drive in the not so safe highway.

The individual, *ex ante*, prefers a legal system that accomplish the collective goal of minimizing the sum of accidents; oppositely, *ex post*, he chooses one that enhances his private interests despite of the goal of ideal reduction of the costs of accidents.

Three elements should constitute the ideal legal system to optimally reduce the sum of cost of accidents: optimal precautions to avoid unreasonable risks, optimal insurance for the residual reasonable risks, and, distributive mechanism to fund the preceding functions.

³² Fried and Rosenberg, *Making Tort Law*, 14 (cited in note 21).

The reasoning developed demonstrates that the optimal social welfare is achieved with an aggregative solution, conferring the best well-being to each and every individual, not mattering if a prospective plaintiff or defendant in a future lawsuit.

C. The Elements for the Optimal Legal System to Reduce the Costs of Accidents

Employing a legal system that minimizes the cost of accidents, therefore distributing more welfare, increases everyone's well-being in any state of the world, in both *ex ante* and *ex post* perspectives.³³

Common sense idea states that it is better to prevent than to redress and demonstrates that, in general, the deterrence function of the law precedes its compensation function.³⁴

The deterrent function or effect of a legal provision is always prescribed in the primary norm of the rule, establishing the conduct that is either permitted, or prohibited, or mandated, according to the three deontic modals of the law.

In some sense the deterrent effect is compared to a behaviour modification feature, nevertheless, the primary norm of the rule stipulates the conduct, while the secondary norm of the same rule carries the sanction for the violation of the former.³⁵

³³ Fried and Rosenberg, *Making Tort Law*, 17 (cited in note 21).

³⁴ But it is important to notice the alert of David Rosenberg that, even though deterrence is assumed to be a "public good", the private claims market (the analysis is not considering possible defenses market) fails to maximize that good, because plaintiffs' attorneys gain nothing of its production, as they are interested in their investment return from the expected judgment of a claim and not the claims' deterrent effect, Rosenberg, 97 Harv. L. Rev. 849, 901 (cited in note 21). *See*, also about public vision of class action: Rosenberg, 62 Ind. L. J. 561, *passim* (cited in note 21) (discussing the conflict between the ideal of individual justice and collective process of class actions, and especially, arguing in favor of mandatory class action for mass torts); Owen Fiss, *The Political Theory of the Class Action*, 53 Wash. & Lee L. Rev. 21 (1996) (discussing the private and public function of the class actions and question of the adequate representation in relation to the Supreme Courts decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)); Abram Chayes, *The Role of the Judge in Public Litigation*, 89 Harv. L. Rev. 1282 (1975-1976) (comparing the separate litigation system ("case-by-case litigation") and the collective litigation system ("class action") and the interference with the traditional adversarial model of litigation).

³⁵ Besides behaviour modification, access to justice and judicial economy are the three stated goals of Canadian class actions according to Craig Jones, *Theory of Class Actions: Optimal Aggregation in Mass Tort Litigation*, 4 (Toronto: Irwin Law Inc., 2003) (cited hereafter as Jones, *Theory of Class Actions*).

Hence, the deterrence purpose of the law should provide the force for the performance of its provisions by threatening firms with liability for full recovery of costs of the harms provoked by them.

The optimal deterrence prevents risks that are costly to incur than to avoid, the so-called unreasonable risks. To achieve social welfare and maximize the individuals' well-being, the investment of social resources in preventing risks must go further to the point that any additional unit of expense in precautionary measures exceeds the benefit of additional risk avoided.³⁶

In one hand, over to ideal level, investments in order to prevent risks of accidents will provoke an over-deterrence effect. The excessive cost for precautions is internalized by the firms into over-priced goods and services that unbalance the market. Ordinarily, there is a constraint of the demand due to the elevation of the price of the goods and services that do not correspond any longer to their expected utility.

On the other hand, absence of threatening firms with liability for the complete cost of their accidents might create an under-deterrence effect. It means that firms will invest less than the optimal pattern to avoid risk, what should probably increase the number of accidents making everyone worse off.

Under optimal deterrence there is a social gain as well as an individual gain. The social welfare is a result of the individuals' expected utility as one internalizes the total costs and benefits of the optimal precaution model that prevents unreasonable risk.³⁷

The second function of civil liability law is to compensate harm inflicted to victims. The best way, in the optimal legal system seeking to confer maximum well-being to rational individuals by reduction of sum of the cost of accidents, is via optimal insurance for injures that arises out of reasonable risks.³⁸

³⁶ Rosenberg, 115 Harv. L. Rev. 831, 843-4 (cited in note 21); Rosenberg, 88 Va. L. Rev. 1871, 1880 (cited in note 23). Craig Jones asserts with clarity: "(...) a situation [optimal tort deterrence] in which very few are negligent because it will cost more to compensate the victim than to take appropriate precautions", Jones, *Theory of Class Actions*, 32 (cited in note 35).

³⁷ Rosenberg, 115 Harv. L. Rev. 831, 844 (cited in note 21); Rosenberg, 88 Va. L. Rev. 1871, 1881-2 (cited in note 21).

³⁸ Steven Shavell states that: "An insurance premium is said to be actuarially fair if it equals the expected cost of coverage to the insurer. For instance, if a policy pays of \$1,000 with probability 10 percent, the fair premium is

The reasonable risk is the one that costs society more to avoid than compensate hence it is not worth to invest any extra social resource in precaution as there will be no gain of the additional risk avoidance.

And what would consist of the optimal insurance for compensating the reasonable risk? The answer is full coverage is the optimal insurance for the risk-averse individuals once it covers all the residual risk that is not prevented by deterrence, and it reflects the ideal coverage where an additional investment in the premium yields negative marginal benefits, *i.e.*, does not generate any return from the insurance policy.

“Essentially, full insurance coverage equalizes individual’s marginal utility from wealth between the accident and no-accident states and thus increases expected utility. The individual effectively employs insurance to transfer wealth from the no-accident state to the accident state up to the point at which an additional dollar of wealth yields the same marginal utility in either state”.³⁹

The characteristic of risk-aversion people is that the marginal utility of the money diminishes as his wealth increases. The more money one has, the less utility he obtains from getting more money. Putting it in another way, it is greater the reduction of utility if one loses a certain amount of money compared with the increased utility for gaining the same amount of money.⁴⁰

The high number of insurance policy acquisition evidences that most of the people are risk averse in most of life risk situations.⁴¹

\$100, for the expected cost of coverage is \$100. Shavell, *Foundations of Economic Analysis of Law*, 258 n. 2 (cited in note 25).

³⁹ Rosenberg, 115 Harv. L. Rev. 831, 845 (cited in note 21).

⁴⁰ Steven Shavell, *Foundations of Economic Analysis of Law*, 258 (cited in note 25); Richard Posner, *Economic Analysis of Law*, 10-11 (cited in note 24).

⁴¹ According to Professor Shavell’s references approximately 86% of the population possess health insurance; approximately 85% of husband-wife families with children possess life insurance on at least one family member; in 2000, approximately 88% of the adult population was covered by the Social Security system; and, over 50% of the workforce possess some kind of private disability coverage, *Id.*, 266-7 n. 11 (cited in note 25).

The preference for optimal deterrence instead of compensation is more than a common sense idea, as we have noticed above. The individual *ex ante* would prefer a legal system that employs the scarce resources in attaining optimal deterrence rather than insuring unreasonable risk.⁴²

Furthermore, even a full *restitution in integrum* for exclusively money damages compensation may not bring the victim to the original position before the injury. This happens because there are other elements that are not completely recouped with money, such as time dispensed with recovery measures, distress due to the violation of the right etc.⁴³

The actual tort system combining deterrence and compensation functions for damages may lead to a misinterpretation in the sense that optimal insurance of unreasonable risk should prevail over its optimal deterrence. The solution to this problem, as proposed by Professor Rosenberg, is to decouple deterrence and compensation effects of civil tort liability.⁴⁴

In class action litigation, this objective is reached by creating an insurance fund judgment separating deterrence and compensation in two different stages.

The judgment determines the *an debeatur* by establishing liability and fixing a global amount for compensation, and then the court stipulates the *quantum debeatur* to be paid individually according to the severity of harm.

In the first one, the deterrence function of the law, the court imposes liability and stipulates the aggregate damages.⁴⁵

In the second stage, compensation operates optimal insurance function by averaging specific-claims variables unrelated to the severity of loss. Hence, the redistribution of wealth

⁴² Rosenberg, 2003 U. Chi. Legal F. 19, 23 (cited in note 21); 115 Harv. L. Rev. 831, 846 (cited in note 21).

⁴³ See, generally, Nelson Rodrigues Netto, *Tutela Jurisdicional Específica: Mandamental e Executiva 'Lato Sensu'* (Rio de Janeiro: Forense, 2002).

⁴⁴ Rosenberg, 88 Va. L. Rev. 1871, 1883-1900 (cited in note 23); David Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims*, Harvard Law School Public Law Research Paper no. 43 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=350940 (cited hereafter as Rosenberg, *Deregulating Insurance Subrogation*).

⁴⁵ Rosenberg, 88 Va. L. Rev. 1871, 1883-5 (cited in note 21).

due to the claims observes the severity of each loss, averaging other variables not related to the severity of the loss, in accordance to the evidence produce in this phase of the action.⁴⁶

In a nutshell, another solution with the same theoretic basis of separating the deterrence and insurance effects of the law would require modification of the actual statutory and contractual governing laws. Deregulating insurance subrogation would allow governmental and commercial first-party insurers to acquire the complete ownership and control of claims, including non-pecuniary, punitive and otherwise damages. The insured, on the other side, would get a premium discount according to an average amount of the prospective recovery of damage-claims.⁴⁷

Considering the wealth differences between people in the real world and the huge social resources that are consumed in an ideal legal system to perform optimal deterrence and insurance, which is funded by the beneficiaries through market prices paid for products, services, labor and taxes for government, the *ex ante* rational individual prefers a system that mandates funding this provisions for redistribution to the less fortunate.⁴⁸

“Because such redistribution may depress incentives for productive enterprise and thus the availability of the goods at any level, the individual *ex ante* rationally prefers that system optimize the trade-off between wealth variation to motivate work on one hand and wealth invariance to fund progressively the availability of basic goods”.⁴⁹

The mutually exclusive preference between the *ex ante* and the *ex post* perspectives, as we have seen in the previous item, attempts to undermine the optimal progressive funding for

⁴⁶ Rosenberg, 88 Va. L. Rev. 1871, 1885-8 (cited in note 21). For a discussion about averaging method and application in collective litigation, see, Bruce Hay and David Rosenberg, *The individual Justice of Averaging*, published in John M. Olin Center for Law, Economics and Business, Harvard Law School, Discussion Paper Series No. 396, available at http://law.harvard.edu/programs/olin_center.

⁴⁷ Rosenberg, *Deregulating Insurance Subrogation* (cited in note 44). See, the proposal in the context of medical malpractice liability, Keneth S. Reinker and David Rosenberg, *Improving Medical Malpractice Liability by Putting Insurers in Charge* (unpublished, on file with the author).

⁴⁸ Fried and Rosenberg, *Making Tort Law*, 22-3 (cited in note 21).

⁴⁹ *Id.*, 23.

the legal system. The “lucky” individual tends to exit or underfund the arrangement as he does not have, *ex post*, incentives to support it.

However, these difficulties can be obviated, as explained by Professors Fried and Rosenberg, because the rational individual prefers some level of the called progressive funding of optimal deterrence and insurance, consistently with any level of wealth redistribution that optimizes the trade-off between redistribution to the less well off and productive enterprise.⁵⁰

Another feature has to be pointed out. Individual’s preferences are mutually exclusive in the *ex ante* and *ex post* universes. While before knowing his luck, he prefers a optimal legal system to minimize the costs of accidents, after the concretization of fate, his option is to maximize his interests disregarding of the consequences of reducing total accident costs.

Consequently, the individuals’ would choose, *ex ante*, a legal system that impedes one to opt-out or act in conflict to it, *ex post*.

Charles Fried and David Rosenberg nominated this mechanism as “mast tying”, because it prohibits individuals, *ex post*, from opting out of the system or acting in conflict with its rules, in a manner that makes it inefficient to provide optimal deterrence, compensation and redistribution that the individuals have chosen *ex ante*.⁵¹

Choices of firms to refrain from investing optimally in precautions, because the accidents have already occurred, or, choices of individuals to not compensating those that

⁵⁰ *Id.*, 23. Charles Fried and David Rosenberg depict the individuals’ diminishing marginal utility from money equating the square root of a given amount of wealth with the welfare the individual would derive from that wealth. Then, they illustrate the choice for the progressive funding with an example of a firm that values \$100,000 and a neighbor that owns \$50,000 wealth. In addition, in order to provide optimal precautions and insurance against pollution produced by the firm costs \$15,000, being \$10,000 the value for optimal precautions and \$5,000, the actuarially premium (for the concept of optimum actuarial insurance premium, *see*, note 35 *supra*). Two regimes follow: one, the neighbor assumes all the costs as the system does not progressively funds the referred expenses. The total net expected welfare is 251.66 resulting from 50% of chance of owing the firm with an welfare of 316.23 (the square root of \$100,000) plus 50% of being the neighbor with an welfare of 108.08 (the square root of \$35,000 (the original wealth of \$50,000 minus funding of \$15,000 for deterrence and insurance)). Otherwise, in a progressive funding system for wealth redistribution, the firm assumes one third of the costs, obtaining a wealth of 308.22 (square root of \$95,000, corresponding the original wealth of \$100,000 minus \$5,000 for funding the system of precaution and insurance). Add 50% of 308.22 to 50% of the neighbors’ wealth of 200 (corresponding to the square root of \$40,000 that is the result of the original wealth of \$50,000 minus the two thirds of the costs of optimal system that is \$10,000). The final result makes everyone better off, whether the firm or the neighbor, with a wealth of 254.11, Fried and Rosenberg, *Making Tort Law*, 24 (cited in note 21).

⁵¹ *Id.*, 24.

suffered accidents, because they were lucky and had escaped; or even, choices of the wealthy ones to not fund redistribution by granting benefits to the less wealthy, would destroy the optimal legal system of precaution and insurance, founded on the original position of absence of knowledge of the world to come, the world behind the veil of ignorance.

“The individual would choose a legal system that minimized the sum of accident costs through progressively funded optimal precautions and optimal insurance and precluded individuals ex post from opting out that mandate or otherwise acting in conflict with it. Individuals wish to “tie themselves to the mast” to ensure that the socially optimal and individually beneficial preferences they chose ex ante will be carried out in the ex post world”.⁵²

As we can realize, the rational individual would choose an optimal legal system that attains ideal social welfare and hence individuals’ well-being, making everyone better off before and after the fact of the accident, with optimal precautions to avoid unreasonable risks, optimal insurance to compensate reasonable risks, progressive funding with optimal redistribution of wealth, and mandatory aggregation of claims and defenses.

III. Explanatory View of the Defendant Class Action

A. The Antecedents of the Defendant Class Action

1. The English Courts of Chancery

In its roots, the representative suits were formed by a group or class of defendants in a lawsuit. The legal action was brought by one plaintiff against some certain respondents acting on behalf of the whole group, due to the common interests that united this designated class of

⁵² *Id.*, 24. *See*, also, Rosenberg, 37 Harv. J. on Legis 393, 402-12, 414-9 (cited in note 21); Rosenberg, 69 B. U. L. Rev. 695, 698-707 (cited in note 21); Hay and Rosenberg, 75 Notre Dame L. Rev. 1377, 1383-9 (cited in note 21); Rosenberg, 71 N. Y. U. L. Rev. 210, 224-252 (cited in note 21); Rosenberg, 62 Ind. L. J. 561, *passim* (cited in note 21).

persons and because of their large number that would make impracticable to order them all to appear before the court.

The work of the chapter solicitor of Canterbury, C. R. Bunce, in the late 18th and early 19th centuries, to organize the dean and chapter's muniments, by separating the documents that concern the activities of the ecclesiastical courts of Canterbury, made possible to acknowledge, in our days, the probable origin and time of the collective litigation, especially the defendant class action.⁵³

Master Martin Rector of Barkway c. Parishioners of Nuthampstead, the ancient name for *Martin v. Parishioners of Nuthampstead*, is a dispute accepted to be the oldest group litigation presently known.⁵⁴

The case is dated *circa* 1199 and involved some parishioners as respondents, representing the whole group of parishioners, in a lawsuit brought by the rector of Barkway, concerning his rights to tithes and obventions from the chapel and their correlative duties.⁵⁵

As we realize the modern class action has its origins in the equity procedures of the English Chancery courts, the bills of peace, where a plaintiff suited several defendants as a class.^{56 57}

⁵³ *Select Cases from the Ecclesiastical Courts of the Province of Canterbury c. 1200-1301*, 2, Introduction. London: Selden Society, 1981 (cited hereafter as *Ecclesiastical Courts*).

⁵⁴ See, Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action*, 38 (Yale 1987) (cited hereafter as Yeazell, *Medieval Group Litigation*); *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 Ariz. L. Rev. 687, 688 (1997). Professor Yeazell makes an interesting sociological review of the parties in *Martin v. Parishioners of Nuthampstead*, if we may say the “opposing powers”, concluding that, in the earlier times, the class action was not yet a device supposedly to play a role to defend the weak party in the litigation. He illustrates this modern aspect of the class action with the phrase “class action historical mission of taking care of the smaller guy” attributed to Judge and Professor Benjamin Kaplan by Martin Frankel, in, *Amended Rule 23 from a Judge's Point of View*, 32 Antitrust L. J. 295, 299 (1966) (Yeazell, *Medieval Group Litigation*, 688-9). For comments and critique of the referred work, see Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U.L. L. Rev. 213 (1990); Robert Klonoff and Edward Bilich, *Class Actions and other Multi-Party Litigation. Cases and Materials*, 18-24 (West Group 2000).

⁵⁵ *Ecclesiastical Courts*, 8-10 (cited in note 53).

⁵⁶ This assertion is undisputed in time. See, Note, *Action under the Codes Against Representative Defendants*, 86 Harv. L. Rev. 89 (1922-1923); Zechariah Chafee, Jr., *Some Problems of Equity* 200 and 153 -197 (University of Michigan Law School 1950) (cited hereafter as Chafee, *Some Problems of Equity*); Comments, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 286, (1985-1986); and, Manual for Complex Litigation, Fourth, §21, 243 (2004).

In the Medieval era, defendant class actions were as frequent as plaintiffs' ones.⁵⁸ Today, it is said that the number of plaintiffs' group litigation supersedes the number of defendant class actions.⁵⁹

The general rule was that the bill should contained all proper parties, unless justice would be best served otherwise by a representative *modus*, as presented by an earlier commentator:

“All persons interested must, in general, be parties to the suit, unless justice will be best administered by entrusting the interest of numerous bodies to the protection of a few, or of remote to near claimants”.⁶⁰

⁵⁷ In a bill of peace an equity court could resolve a controversy between an individual (called the adversary) and several persons (called the multitude), where there was common questions of law or fact, or both, involving each and every one of them, and where there was no basis for a party joinder under the common law.

⁵⁸ Professor Chafee states: “The older cases draw no distinction between a class of defendants and a class of plaintiffs”, Chafee, *Some Problems of Equity*, 203 (cited in note 56).

⁵⁹ *Development in the law – Class Action*, 89 Harv. L. Rev. 1318, 1325 and n. 30 (1975-1976) (asserting that by far the largest group of class actions on federal court dockets are civil rights cases filed by plaintiffs, with approximately 50% of the total of the cases according to statistics for the years 1973-1976) and, Comments, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 283 n. 2, 284 (1985-1986) (arguing that civil rights actions constitute the largest percentage of class action suits filed in federal courts, with percentages of 38.6% in 1983 and 37.3% in 1984, however, arguing in favor of defendant class action for a greater vindication of constitutional and statutory civil rights). The percentage seems to remain the same as shown in the Table 2.2 *infra*, available at <http://www.uscourts.gov/judicialfactsfigures/table2.02.pdf> (last visited April, 11th, 2006).

Table 2.2 (Continued)

U.S. District Courts. Civil Cases Filed by Nature of Suit

(Highlighted areas cover data previously provided in separate tables)

Nature of Suit	Fiscal Year							
	1997	1998	1999	2000	2001	2002	2003	2004
ACTIONS UNDER STATUTES, TOTAL	167,414	158,459	159,185	162,583	166,792	168,010	169,253	181,017
Antitrust	598	580	645	858	723	826	762	752
Bankruptcy, Total	4,139	3,833	3,725	3,361	2,950	4,100	3,305	4,145
Appeal (28 USC 158)	3,475	3,313	2,958	2,785	2,518	2,636	2,658	2,822
Withdrawal (28 USC 157)	664	520	768	576	431	1,464	647	1,323
Banks and Banking	280	236	220	205	214	251	223	366
Civil Rights, Total (4)	43,278	42,354	41,304	40,908	40,910	40,420	40,516	40,239
Voting	141	108	102	167	195	234	147	173
Employment	23,796	23,735	22,480	21,032	21,167	20,866	20,607	19,706
Accommodations	864	839	1,138	1,201	1,249	1,313	1,315	1,222
Welfare	81	66	63	80	61	71	65	81
Other Civil Rights	18,396	17,607	17,519	18,345	18,248	17,947	18,402	19,037

⁶⁰ Basil Montagu, *A Digest of Pleading in Equity* 47, vol. I (J. & T. Clarke 1824) (cited hereafter as Montagu, *Pleading in Equity*, v. I).

Three distinct circumstances authorized the representative litigation: a) when from the number of persons some may act on behalf of the whole⁶¹; b) where claimants are remote⁶²; and, c) where necessary parties cannot be brought before the court.⁶³

According to Basil Montagu the first group embraced, just like the case of *Martin v. Parishioners of Nuthampstead*, suits concerning commoners and rights to tithes:

“A suit may be instituted by a lord of the manor against some of the tenants, or by some of the tenants against the lord on a question of common”.⁶⁴

Also belonged to the same category suits involving terre-tenants⁶⁵; committees of large bodies⁶⁶; ship’s companies⁶⁷; creditors, legatees and trustees⁶⁸; and, large bodies in nature of partnerships.

In *Adair v. New River Company*, a case involving a large body in nature of partnership placing as respondents the New River Company and more than one hundred other persons, it has been established:

⁶¹ *Id.*, 57-63.

⁶² *Id.*, 63-5.

⁶³ *Id.*, 65-6.

⁶⁴ Montagu, *Pleading in Equity*, v. I, 57-8, citing *York v. Pilkington*, 1737, 1 Atk. 283 (cited in note 60) (authority citation, in, Basil Montagu, *A Digest of Pleading in Equity*, vol. II, 164 note EN, (J. & T. Clarke 1824) (cited hereafter as Montagu, *Pleading in Equity*, v. II).

⁶⁵ *See, Attorney-General v Heelis*, 2 Simons and Stuart 67, 57 E.R. 270 (1824).

⁶⁶ “A suit may be maintained against the committee who contract on behalf of a society” Montagu, *Pleading in Equity*, v. I, 60, citing *Cousins v Smith*, 13 Ves. 544 (1807) (cited in note 60) (authority citation, in, Montagu, *Pleading in Equity*, v. II, 170 note EX, cited in note 64).

⁶⁷ In *Good v Blewitt*, the Master of the Rolls, Sir W. Grant, ruled that: “Bill by one of the Officers and crew of a Privateer against the owners for an account of captures, according to the articles. Leave given to amend by stating, that the Bill was on behalf of the Plaintiff and all others; and upon that amendment the account was decreed” (13 Vesey Junior 397, 33 E.R. 343, 1807).

⁶⁸ *See, Leigh v Thomas* 2 Vesey Senior 312, 28 E.R. 201 (1751).

“The general rule, requiring all persons interested to be parties, dispensed with, where it is impracticable, or, extremely difficult. In such a case, to obtain a decree, to establish the right of suit to a mill, for instance, the Court only requires parties sufficient to secure a fair contest; and, the right being established in that way, consequential relief may be had against the rest in another suit”.⁶⁹

Similarly, in *Cockburn v. Thompson*, a case concerning a bilateral aggregative procedure, the bill was filed by several persons, on behalf of themselves and all others the proprietors of a philanthropic institution, against Thompson and other bankers, the Lord Chancellor [Eldon] ruled:

“The strict rule, that all persons, materially interested, must be parties, dispensed with, where it is impracticable, or very inconvenient: as in the case of a very numerous association in a joint concern; in effect a partnership. Defect of parties the subject of Demurrer, or Plea; as it appears, or not, on the face of the Bill”⁷⁰

The second set of cases, where claimants are remote, are related to contingent estates and entails⁷¹, and lessees and mortgagees.⁷²

The third and last group of the classification concerns to cases where necessary parties cannot be brought before the court, especially when one is out of the jurisdiction of the court.⁷³

⁶⁹ 11 Vesey Junior 429, 32 E.R. 1153 (1805).

⁷⁰ 16 Vesey Junior 321, 33 E.R. 1005 (1809).

⁷¹ “When real property is subject to an entail, or contingent limitation or executory devise, it is generally sufficient to make the first person *in esse*, in whom an estate of inheritance is vested, a party, with those claiming prior interests”, Montagu, *Pleading in Equity*, v. I, 63-4 (cited in note 60).

⁷² “Persons who claim under the possession of a party whose title to real property is disputed, are not necessary parties, unless their rights are to be prejudiced by the suit”, Montagu, *Pleading in Equity*, 64, v. I. (cited in note 60).

⁷³ See, *Att. Gen. v. Baliol College*, in Chancery, Dec. 11th, 1744, *apud*, Montagu, *Pleading in Equity* v. I, 65 n. (e) (cited in note 60).

Others commentators emphasize some different topics to classify the old English collective procedures, nonetheless, without much of difference in substance.

For instance, James Wm. Moore affirms: “At an early date the class action was recognized as proper in three situations: (1) where the number of interested persons was so great that joinder was impracticable; (2) if joinder were effected, continued abatement by death or otherwise would prevent a decree; and (3) where effective joinder of certain interested persons was impossible because they were not subject to the jurisdiction of the court”.⁷⁴

Zechariah Chafee, Jr. points out: a) representation by rule of law; b) where there is a large and indefinite number of persons; and, c) when the claim is by or against definite persons who are very numerous, being this case, according to the author, the one closest to the modern class suit.⁷⁵

And, Joseph Story proposes: “The most usual cases arranging themselves under this head of exceptions are, (1) where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those , who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and although they have, or may have separate distinct interests; yet it is impracticable to bring them all before the Court”.⁷⁶

2. The American Law and Jurisprudence

a) The Federal Equity Rule 48 (1842)

⁷⁴ 5 *Moore’s Federal Practice*, §23 App. 100-20 (Matthew Bender, 3rd Ed.) (cite hereafter as 5 *Moore’s Federal Practice*).

⁷⁵ Chafee, *Some Problems of Equity* 209 -13 (cited on note 56).

⁷⁶ *Commentaries on Equity Pleadings*, §97, 109 (Gaunt Inc, 2001).

Following the English bills of peace, permitting a representative suit in exception to the rule of compulsory joinder of all interested parties to an action, the United States adopted the same sort of legal provision.

At this time it was ordinary to have representatives groups of litigants, either in the defendants side or in the plaintiffs pole of the procedural relationship, hence, one single rule, the Federal Equity Rule 38 of 1842, prescribe for plaintiffs' and defendants' class actions.⁷⁷

The Equity Rule 48 depicted the collective litigation in one paragraph with two sentences. The first one provided, in a very simple and straightforward manner, that whenever the parties on either side (therefore, expressly adopting representative lawsuits either of plaintiffs or defendants), were so numerous that all could not be brought before the court without manifest inconvenience or oppressive delay in the suit, the court discretionarily could order the suit to proceed with sufficient parties representing all the adverse interests of the plaintiffs and the defendants.

However, the second sentence was incoherent with an aggregative procedure, because it read: "[B]ut, in such cases, the decree shall be without prejudice to rights and claims of all the absent parties". It does not make sense authorizing a representative party to pursue claims or presents defenses, on behalf of a whole class of persons, with similar interests, and at the same time release them from the binding effect of the judgment.

The incongruous result would be that solely the representative parties of the plaintiffs or of the defendants, or even, of both of them, would be bound by the ruling. Meanwhile the other members of the classes would be able to go, indefinitely, arguing and defending the common adverse interests. In each new lawsuit, the enforcement of the decision would only be made upon the representative parties, and, once again, permitting a new class action to be filed with different classes representatives.

Nevertheless, the literal interpretation of the provision had not been adopted by the Supreme Court. In one of the first class action on the American jurisprudence, the case *Smith v. Swormstedt*, Mr. Justice Nelson, delivering the opinion of the Court, ruled:

⁷⁷ **Equity Rule 48 (1842):** "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the Court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to rights and claims of all the absent parties".

“An object was taken, on the argument, to the bill for want of proper parties to maintain the suit. We think the objection not well founded. (...) For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and **the decree binds all of them the same as if all were before court**” (emphasis added).⁷⁸

Therefore, the class action principle of some representing a crowd of persons, with the same common interests, and the judgment binding the whole, had been preserved by the Supreme Court interpretation of the Equity Rule 48.

b) The Federal Equity Rule 38 (1912)

The rule of representative actions with classes of defendants or plaintiffs was duly incorporated into the statutes and, consequently, provided in the new equity Rule 38.

The successor of the equity rule of 1842, the equity Rule 38 of 1912, revoked the clause concerning the nonbinding effect of the decision, and established two requirements for the collective procedure: a common or general question *and* the impracticability to bring before court all members of the class due its large number, as it reads:

Rule 38. When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

Moreover, the federal equity rule had been integrated into the procedural code of many states. Some of them used the same language requiring both requisites to the class action.⁷⁹

⁷⁸ 57 U.S. 288, 302 (1853).

⁷⁹ For example, adopted this model the states of Colorado, Florida, Delaware, Connecticut, cf. Carl C. Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Cornell L. Q. 399, 400 (1933-1934). See also, Charles A. Wright, Arthur R. Miller, and, Mary Kay Kane, *Federal Practice and Procedure: Civil*, 3ed., §1751, 14-15, (Thomson-West 2005), vol. 7A (cited hereafter as Wright-Miller-Kane, *Federal Practice*); and discussing the requisites for representative suits and its binding effects, William W. Blume, *The “Common Questions”*

Others used the disjunctive *or* admitting the class suit in equity, either if the class was numerous *or* if there was a common interest.⁸⁰ Anyhow, even in the latter cases, some courts interpreted the rules as requiring the fulfillment of both requisites in order to allow the collective suit to proceed.⁸¹

Under the provision in comment, the Supreme Court reaffirmed the doctrine established in *Smith v. Swormstedt*, creating the leading case for the 20th century, concerning the binding effect upon the absent parties in a class suit. Mr. Justice Day was emphatic, when delivering the opinion of the Court in *Supreme Tribe of Ben-Hur v. Cauble*, affirming that:

“If the federal courts are to have the jurisdiction in class suits to which they are obviously entitled, the decree when rendered must bind all of the class properly represented. The parties and the subject-matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court. The subject-matter included the control and disposition of the funds of a beneficial organization and was properly cognizable in a court of equity. The parties bringing the suit truly represented the interested class. If the decree is to be effective and conflicting judgments are to be avoided all of the class must be concluded by the decree”.⁸²

In previous cases, the Supreme Court had had already given binding effect to all members of a life insurance policy or of a fraternal benefit scheme represented in a collective

Principle in the Code Provision for Representative Suits, 30 Mich. L. Rev. 878 (1931-1932); Chester B. McLaughlin, *The Mysteries of the Representative Suit*, 26 Geo. L. J. 878 (1937-1938).

⁸⁰ For example: California, New York, Ohio, Washington, cf. Wheaton, 19 Cornell L. Q. 399 (cited in note 79).

⁸¹ See, Wright-Miller-Kane, *Federal Practice*, 15 (cited in note 79).

⁸² 255 U.S. 356, 367 (1921).

suit⁸³, which are considered the precedents for the “limited fund” class actions, as cited in *In re Joint Eastern & Southern District Asbestos Litigation*, 129 B.R. 710 (1991).⁸⁴

Anyhow, consideration concerning adequate representation to produce *res iudicata* to all members of a class is still the most intricate aspects of collectivized litigation, and it seems not yet totally settled by the Supreme Court.⁸⁵

c) The Federal Rules of Civil Procedure (1938) – Rule 23

In September 16th, 1938, the Federal Rules of Civil Procedure became effective⁸⁶, producing a major alteration of the law, ceasing the equitable basis for the class actions, as the federal statute merged the procedures in Law and Equity, establishing just one form of civil of action, in the Rule 2.⁸⁷

The Advisory Committee Notes of 1937 to the original Rule 23 stated that the new rule was: “a substantial restatement of Equity Rule 38 (Representatives of Class) as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable”.⁸⁸

⁸³ *Supreme Council of the Royal Arcanum v. Green* 237 U.S. 531 (1915); *Hartford Life Insurance Company v. Ibs*, 237 U.S. 662 (1915); *Hartford Life Insurance Company v. Barber*, 245 U.S. 146 (1917).

⁸⁴ “In 1912, Rule 48 of the Federal Equity Rules was rewritten as Rule 38. The new rule allowed representative suits where the parties were too numerous for joinder. In contrast with the prior rule, absent parties could be bound by subsequent judgments pursuant to this provision. One of the best examples of a limited fund case from this time period is *Hartford Life Ins. Co. v. Ibs*, 237 U.S. 632, 59 L. Ed. 1165, 35 S. Ct. 692 (1915). The case involved an insurer's contingency fund created through contributions from policyholders. The Supreme Court found that the policy was properly treated as a unit and that the adjudication of rights to it had to be determined in a single suit in which all policyholders were joined. (...) See also *Sovereign Camp of the Woodmen of the World v. Bolin*, 305 U.S. 66, 78-79, 83 L. Ed. 45, 59 S. Ct. 35 (1938) (group challenge to reorganization of fraternal benefit association necessitated compulsory joinder)”, *In re Joint Eastern & Southern District Asbestos Litigation* 129 B.R. 710, 804 (1991). See, also, Alba Conte and Herbert Newberg, *Newberg on Class Action*, §1:9, 31-2 (Thomson-West 2002) Vol. 1 (cited hereafter as Conte-Newberg, *Newberg on Class Action*).

⁸⁵ See, Chafee, *Some problems of equity*, 230 (cited in note 56); Wright-Miller-Kane, *Federal Practice*, §1751, 17 (cited in note 79).

⁸⁶ Cf. Federal Rules of Civil Procedure, 6 (Thomson-West 2005).

⁸⁷ **Rule 2. One Form of Action.** There shall be one form of action to be known as “civil action”.

⁸⁸ Of course it was already part of the History of Law the rigid proceedings of the old common law *writs*, similar to the five *legis actiones* of the ancient Roman Law, where a *de facto* situation should strictly reproduce a writ, otherwise the action could not be prosecuted.

In accordance to the legal tradition, the Rule 23 established that if the persons constituting a class, of defendants or plaintiffs, or both, were so numerous to make it impracticable to bring them all before court, one or more could represent the whole class. Regarding the representation, the rule accentuated that conducting parties should fairly insure the adequate representation of the absent parties.⁸⁹

In addition, Rule 23 stipulated a classification of the collective suits, considering the character of the right sought to be enforced for or against the class. Hence, three different types of class actions existed in the clauses (1), (2) and (3) of the Rule 23(a), and became to be known, respectively, as “true”; “hybrid”; and, “spurious”- where the rights were several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

The denomination of “true”, “hybrid” and “spurious” types of class actions is attributed to Professor James Moore, and even though it is lengthy, we kindly ask to be excused to reproduce his lesson explaining each and every one of them:

“Under original Rule 23(a) there were three types of class actions, all of which involved a class of persons which was so numerous as to make it impracticable to bring all its members before the court, so that a suit on behalf of or against the class could be brought by or against one or more members of the class who would insure adequate representation of the whole class. The distinction between the types of class suits under original Rule 23(a) depended upon the jural relationship among the class members with regard to the right sued upon. Thus subdivision (a)(1) of original Rule 23 dealt with the **true** class suit which involved a class in which the right sought to be enforced by or against the class was "joint, or common, or secondary in the sense that the owner of a

⁸⁹ **Rule 23. Class Actions.**

“(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is (1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought”.

primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it." This class suit involved principles of compulsory joinder, since had it not been for the numerosity of the class members all should have been before the court. A judgment in a true class suit, whether favorable or unfavorable to the class, was binding under *res judicata* principles upon all the members of the class, whether or not they were before the court. It was the nondivisible nature of the right sued on which determined both the membership of the class and the *res judicata* effect of the final determination of the right.

Subdivision (a)(2) of original Rule 23 dealt with the **hybrid** class suit, which involved situations in which the rights sought to be enforced by or against the class were several, and the object of the action was the adjudication of claims affecting specific property. A judgment under (a)(2) was binding under *res judicata* principles upon all the members of the class, but only with regard to claims involving the specific property which it was the object of the action to settle.

Subdivision (a)(3) of original Rule 23 dealt with the **spurious** class action, where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought. The spurious class action was a permissive joinder device. Once a spurious class action was brought, with a class of sufficient numerosity, by representatives of the class who could adequately represent the interests of the class, other members of the class were free to come forward and join the action. If they did not do so, they were not bound, under principles of *res judicata*, by the outcome of the action, whether favorable or unfavorable to the class. The spurious class action thus provided a means for the adjudication in one lawsuit of a number of separate claims involving common questions of law or fact where a common relief was sought" (emphasis added).⁹⁰

⁹⁰ 5 Moore's *Federal Practice*, §23 App. 101 (cited in note 76). For further explanation of Professor Moore's doctrine, see, James Wm Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft* 25 Geo L. J. 551, 571-576 (1936-1937); Marcus Cohn and James Moore, *Federal Class Actions*, 32 Ill. L. Rev. 307, 314-320 (1937-1938); Marcus Cohn and James Moore, *Federal Class Actions - Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 550 (1937-1938). See, also, Hiram L. Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34, 40-56 (1937-1938).

At the outset, the rule had been well regarded as an endeavor to improve the use of class actions⁹¹, but the practice evidenced otherwise, with courts facing unsurmountable difficulties to distinguish the categories of rights to be enforced with the adjectives employed of “joint”, “several” and “common”. Besides, it was very difficult to conform the cases into the format of the types of the classes prescribed in Rule 23.⁹²

Early commentators of the federal statute affirmed that: “Rule 23 then is not a rule at all; at most it is a restatement of law somewhat comparable to the volumes of American Law Institute, or better, a caveat therein”.⁹³

⁹¹ “Rule 23 as to class actions is simple and intelligible, which is more than can be said of any rule that I know of heretofore promulgated either by statute or court rule”, Edson R. Sunderland, *The New Federal Rules*, 45 W. Va. L. Q. 5, 16 (1938-1939). See, also, William VanDercreek, *The “Is” and “Ought” of Class Action under Federal Rule 23*, 48 Iowa L. Rev. 273 (1962-1963).

⁹² Extensive critique had been made by the Advisory Committee Note of 1966 to Revision of Rule 23: “Difficulties with the original rule. The categories of class actions in the original rule were defined in terms of the abstract nature of the rights involved: the so-called “true” category was defined as involving “joint, common, or secondary right”; the “hybrid” category, as involving “several” rights related to “specific property”; the “spurious” category, as involving “several” rights affected by a common question and related to common relief. It was thought that the definitions accurately described the situations amenable to the class-suit device, and also would indicate the proper extent of the judgment in each category, which would in turn help to determine the *res judicata* effect of the judgment if questioned in a later action. Thus the judgments in “true” and “hybrid” class actions would extend to the class (although in somewhat different ways); the judgment in a “spurious” class action would extend only to the parties including intervenors. (...) In practice the terms “joint”, “common” etc., which were used as the basis of the Rule 23 classification proved obscure and uncertain. (...) The courts have considerable difficulty with these terms. (...) Nor did the rule provide an adequate guide to the proper extent of the judgments in class actions. First, we find instances of the courts classifying actions as “true” or intimating that the judgments would be decisive for the class where these results seemed appropriate but were reached by dint of depriving the word “several” of coherent meaning. (...) Second, we find cases classified by the courts as “spurious” in which, on a realistic view, it would seem fitting for the judgments to extend to the class. (...) The “spurious” action envisaged by original Rule 23 was in any event an anomaly because, although denominated a “class” action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party. It was believed to be an advantage of the “spurious” category that it would invite decisions that a member of the “class” could, like a member of the class in a “true” or “hybrid” action, intervene on an ancillary basis without being required to show an independent basis of Federal jurisdiction, and have the benefit of the date of the commencement of the action for purposes of the statute of limitations. (...) These results were attained in some instances but not in others. (...) The results, however, can hardly depend upon the mere appearance of a “spurious” category in the rule; they should turn on more basic considerations. (...) Finally, the original rule did not squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class”.

⁹³ Harry Kalven, Jr. and Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 706 (1940-1941). Professor Chafee asserted that: “This tribute to the memory of Wesley Hohfeld would be more suitable in a law review than in an enactment which is to guide the actions of practical men day in and day out”, *Some problems of equity*, 246 (cited in note 54). See, also, Wright-Miller-Kane, *Federal Practice*, §1752 (cited in note 79); Conte-Newberg, *Newberg on Class Action*, §1:10, 33, (cited in note 84); Benjamin Kaplan,

A point to be noted is that the “spurious” class action, as above explained by Professor Moore, adopted an *opting-in* system, *i.e.*, in order to be bound by the decision, whether favorable or unfavorable to the class, the members ought to come forward and join the action.⁹⁴

The Rule 23 in effect today stipulates two mandatory class action under subdivision (b)(1) and subdivision (b)(2), and, one *opting-out* provision under subdivision (b)(3) as established by the subdivision (c)(2).^{95 96}

B. The Characteristic of the Defendant Class Action

1. Introduction

The use of defendant class action is ample and there is no legal restriction for its application in any field of law. However, it is more frequent in lawsuits involving civil

Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 380-6 (1967-1968); Richard L. Marcus & Edward F. Sherman, *Complex Litigation*, 210 (West Group 1998); Notes, *Federal Class Actions: a Suggested Revision of Rule 23*, 46 Colum. L. Rev. 802, 818-836 (1946); Irving A. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois* 42 Ill L Rev 518, 518-533 (1947-1948); Arthur J. Keeffe, Stanley M. Levy and Richard P. Donovan, *Lee Defeats Ben Hur* 33 Corn LQ 327(1947-1948); Note, *Binding Effects of Class Actions*, 67 Harv. L. Rev. 1015, 1059-1067 (1953-1954); *Developments in the Law – Multiparty Litigation in the Federal Courts*, 71 Harv. L. Rev. 874, 928-943 (1957); Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433 (1959-1960); Joseph J. Simeone, *Procedural Problems of Class Suits* 60 Mich L Rev 905 (1961-1962).

⁹⁴ See, also, Chafee, *Some problems of equity*, 259 et seq (cited in note 54); Kaplan, 81 Harv. L. Rev. 356, 396-8 (cited in note 93). But, compare, Wright-Miller-Kane, *Federal Practice*, §1752, 30-42, (cited in note 79); Kalven and Rosenfield, 8 U. Chi. L. Rev. 684, 711 (advocating a *secundum eventum litis* effect of the judgment in order to allow the absent plaintiffs to join the suit if the decision was favorable and not to be bound by its decree if it is unfavorable) (cited in note 93).

⁹⁵ **Rule 23(c)(2)**. “In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the case if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel”.

⁹⁶ See, Martin H. Redish, *Class Action and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 130-2 (2003) (arguing for a replacement of the *opt-out* rule with an *opting-in* mechanism).

rights⁹⁷; disputes challenging constitutionality of state and local law and practices enforced by public officials; suits against unincorporated associations, *e.g.*, labor unions. But defendants' classes have also been certified in other contexts, such as patent infringement; antitrust; securities, and environmental.⁹⁸

The multiple goals or principles of collective suits are applicable both to plaintiffs' and defendants' class actions: (i) access to justice; (ii) deterrence or policing behaviors; (iii) equilibrium of the parties in litigation; (iv) judicial and process resources economy; and, (v) avoidance of incompatible adjudication.

Without analyzing the defendants' point of view, one commentator has enumerated five advantages plaintiffs can gain with defendant class action: prosecution of low stakes claims (goals of access to justice and parties equilibrium); tolling of the limitations period against the whole class (goal of resources economy); prevention of collateral estoppel (goal of resources economy); avoidance of incompatible decisions (goal of avoidance of incompatible adjudication); and overcoming problems of personal jurisdiction and venue (goal of access to justice).⁹⁹

It is noteworthy that the advantages of the defendant class action are not limited to the plaintiffs. The defendant class action is a collective device that is operational, functional, favoring, indistinctively, authors or respondents in representative suits.

As a consequence, the augment of the law enforcement, by means of collective litigation, might diminished or ceased, where there is the possibility of class members (either

⁹⁷ See, Part III, A.1, note 59, *supra*.

⁹⁸ See, commentators and case authorities cited therein: Conte-Newberg, *Newberg on class action*, §4:51, 352 n. 1, 353 nn. 2-5, 354 nn. 6-9, 355 nn. 10-1 (cited in note 84); Notes, *Defendant Class Actions*, 91 Harv. L. Rev. 630, 632 nn. 11-5 (1977-1978); Barry M. Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459, 459 n. 4 (1977); Note, *Development in the law – Class Action*, 89 Harv. L. Rev. 1318, 1325 and n. 30 (cited in note 57); Comments, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. Rev. 283, 283 n. 2, 284 (cited in note 57); Debra J. Gross, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 Emory L. J. 611, 616 n. 18 (1991); A. Peter Parsons and Kenneth W. Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23*, 4 Ecology L. Q. 881, 882 n. 6 (1974-1975); Note, *Personal Jurisdiction and Rule 23 Defendant Class Action* 53 Ind. L. J. 841, 844 (1977-1978); Spencer Williams, *Some Defendants have Class: Reflections on the Gap Securities Litigation*, 89 F.R.D. 287, 2 (1981).

⁹⁹ Cf. Wolfson, 38 Ohio St. L. J. 459, 459-60 (cited in note 98).

plaintiffs or defendants) to exit from the lawsuit. This happens with the mechanism of opting-out provided for classes certified under the rule 23(b)(3).

Even though the Federal Rules of Civil Procedure has disciplined solely in Rule 23 the procedure for either plaintiff or defendant class actions, they can not be treated identically as one being the mirror-image of the other one.¹⁰⁰ There are many specifics that differ from each other's angle.

Rule 23, in its current version, is much more elaborated than the past statutory rule concerning representative suits in the United States.

A variety of details of the class action procedure and its effects is established in the Rule 23, in eight subdivisions (including those related to the requisites - 23(a) and , the types - 23(b), of the class actions).

The subdivision 23(c) disciplines the timing and the elements for the class certification order; the appropriateness of notice and its contents; and, the judgments' effect; subdivision 23(d) is concerned with the orders in conduct of the actions; subdivision 23(e) is related to settlement, voluntary dismissal, and compromise; 23 (f) deals with appeals; subdivision 23(g) provides for class counsel¹⁰¹; and, finally, subdivision 23(g) is about attorney fees award.¹⁰²

The provisions that define the requisites for certification and maintenance of a class action are stated in subdivision 23(a) and 23(b). In the following items, we are going to concisely scrutinize the referred rules under the standpoint of a defendant class action.

a) Rule 23(a) Prerequisites for Certification of the Class Action.

The 1966 Amendment to the Rule 23, of the Federal Rules of Civil Procedures, rewrote completely the rule in order to overcome major difficulties courts and commentators have realized in regard to the original version of 1938.

¹⁰⁰ See, Conte-Newberg, *Newberg on class action*, §4:46, 336, (cited in note 84); Debra J. Gross, 40 Emory L. J. 611, 664 (cited in note 98).

¹⁰¹ See, Part IV, D.2.(a), *infra*.

¹⁰² See, Part IV, D.2.(b), *infra*.

The Advisory Committee Note of 1966 Revision of the Rule 23 made a profound critique to the 1938 Rule 23¹⁰³, and pointed out that the amended rule is “described in more practical terms the occasions for maintaining class actions”.

Rule 23(a) establishes four prerequisites to every class action, either plaintiffs’ or defendants’: numerosity, commonality, typicality, and, adequate representation.¹⁰⁴

Concerning the first requisite, the test stipulated by the statute is the impracticability of joinder of the whole members of the class due to its numerosity. There is not a minimum number of people which over that the class action procedure is authorized, once impracticability is not impossibility of joinder.¹⁰⁵ The circumstances surrounding the case have to be examined in order to check the fulfillment of the numerosity requirement.¹⁰⁶

Although the number of the putative class is the primordial factor to certify a class action in relation to the numerosity requirement, one commentator has pointed out that a court shall consider for the impracticability of joinder other elements, such as: (i) judicial economy arising from avoiding multiple actions; (ii) the geographic dispersion of the class members; (iii) the financial resources of the class members; (iv) the claimants’ ability to institute individual suits (in plaintiff’s actions), and, we add, the defendants’ ability to individually defend themselves; and, (v) requests for prospective and injunctive relief that could affect future class members.¹⁰⁷

The standard is applied more flexibly to defendant class actions than plaintiffs’ one by reason of enhancing the collective litigation goal of judicial resources economy. It is more

¹⁰³ See, Part III, A.2.(c), note 93, *supra*.

¹⁰⁴ **Rule 23(a) Prerequisites to Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

¹⁰⁵ A class has been certified with only thirteen defendant members (*Dale Electronics, Inc. v. R.C.L. Electronics, Inc.*, 53 F.R.D. 531, 534 – D.N.H. 1971), or, even twenty six defendants (*Management Television System, Inc. v. National Football League*, 52 F.R.D. 162 – E.D. Pa. – 1971).

¹⁰⁶ See, for example, *Town of New Castle v. Yonkers Contracting*, 131 F.R.D. 38, 40 (S.D.N.Y. 1990). See, also, Notes, *Federal Rules of Civil Procedure 23: A Defendant Class Action with a Public Official as the Named Representative*, 9 Val. L. Rev. 357, 365 and n. 30, 366 and n. 31-3 (1974-1975); Comments, 33 UCLA L. Rev. 283, 298 n. 72 (cited in note 59); Notes, 91 Harv. L. Rev. 630, 633 n. 20 (cited in note 98).

¹⁰⁷ 5 *Moore’s Federal Practice*, §23.22 (cited in note 74).

likely that many individuals' lawsuits may be brought in case of denial of certification of a defendant class, than it would occur with a plaintiff class action. In the latter case, just one or a few plaintiffs shall resort to an individual suit, after the class certification has been denied.¹⁰⁸

The second prerequisite of the Rule 23(a) is commonality of questions of law or fact to the class. Despite of the fact that the provision is in plural - "questions" - the objective of it is to obtain efficiency by collective adjudication and to protect absentees' interests by solving, at least one, relevant nuclear question of law or fact.¹⁰⁹

Courts have not had much difficulty in asserting the commonality requirement¹¹⁰, but rather have given it a cursory treatment because it figures to be superfluous or overlapped by other provisions of Rule 23(a) and (b).¹¹¹

Moreover, the Supreme Court, in the case *General Tel. Co. of the Southwest v. Falcon*, has stated that commonality and typicality tend to merge together, and also with the requisite of adequate representation.¹¹²

¹⁰⁸ Conte-Newberg, *Newberg on Class Actions*, §4:57, 370, (cited in note 84). See, also, See, Robert E. Holo, *Defendant Class Actions: The Failure of the Rule 23 and a Proposed Solution* 38 UCLA L. Rev. 228, 229 and nn. 24-7, (1990-1991).

¹⁰⁹ *Baby Neal for & by Kanter v. Casey*, 43 F. 3d 48, 56 (3rd Cir. 1994); *Tecnograph Printed Circuits, Ltd. V. Method Electronics*, 285 F. Supp. 714, 719 (N.D. Ill. - 1968); *Appleton Electric Co. v. Advance-Utility Expressways*, 494 F. 2d. 126 (7th Cir. - 1974). See, also, 5 *Moore's Federal Practice*, §23.23 (cited in note 74); Robert H. Klonoff, *Class Action and other Multi-Party Litigation in a Nutshell*, 37 (West - 2004) (cited hereafter as Klonoff, *Class Action in a Nutshell*); Parsons and Starr, 4 Ecology L. Q. 881, 884-7 (cited in note 98).

¹¹⁰ See, Holo, 38 UCLA L. Rev. 228, 230 (cited in note 108).

¹¹¹ See, Notes, 9 Val. L. Rev. 357, 369 n. 40 (cited in note 106); 5 *Moore's Federal Practice*, §23.23 (cited in note 74).

¹¹² "The *commonality and typicality* requirements of Rule 23(a) *tend to merge*. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. *Those requirements* therefore also *tend to merge with the adequacy-of-representation* requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest. In this case, we need not address petitioner's argument that there is a conflict of interest between respondent and the class of rejected applicants because an enlargement of the pool of Mexican-American employees will decrease respondent's chances for promotion" (emphasis added); *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 (1982).

The common questions of law or fact in a defendant class action may emerge out of the context, for example, of a suit challenging the constitutionality of a statute enforced by several public officials. The constitutionality of the legal rule gives rise to an identical defense for all the class of public law enforcers.

Typicality is the third prerequisite to a class action and, according to the Supreme Court interpretation, tends to merger with commonality and adequate representation.

The optimal exam of the presence of this requisite is performed by the verification of the defense of the proposed class representative and the absence of conflictual interests with the class members. Further, the defenses for all class members should be grounded in the same legal theory.¹¹³

In addition, a defense would lack typicality if it could only be applied to the class' representative. Therefore, the defense shall be considered typical if it protects the interests of the putative members of the class, notwithstanding, "typicality does not require that the defenses be identical or perfectly coextensive; substantial similarity is sufficient" (cf. *Thillens, Inc. v. Community Currency Exchange Association of Illinois*, 97 F.R.D. 668, 678 - 1983).

Another test for typicality is the so-called "juridical link" doctrine, emerged from the case *La Mar v. H& B Novelty & Loan Co.*, positing that where the defendants are "juridically related in a manner that suggests a single resolution of the dispute would be expeditious" the class action procedure should be applied.¹¹⁴

The *La Mar* decision denied certification of a bilateral class action because the representative plaintiff has had relationship with only one defendant, and so he did not have cause of action against all the other defendants. Therefore, there was lack of typicality of claims.

¹¹³ See, Conte-Newberg, *Newberg on Class Actions*, §4:59, 373-4, (cited in note 84); Klonoff, *Class Action in a Nutshell*, 43 (cited in note 109); Notes, 9 Val. L. Rev. 357, 376 (cited in note 106); Comments, 33 UCLA L. Rev. 283, 303 (cited in note 59).

¹¹⁴ 489 F.2d. 461, 466 (9th Cir. - 1975).

In this case, the Ninth Circuit Court asserted: “In brief, typicality is lacking when the representative plaintiff’s cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies”.¹¹⁵

The exceptions to the above explained theory, in accordance to the *La Mar* court, would be those “(...) in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury”.¹¹⁶ Besides the existence of a conspiracy or a concerted scheme, other exception, as pointed out, is the presence of the “juridical link”.¹¹⁷

Although it may be considered that the juridical link test establishes a higher standard of typicality, it is useful in the definition of the scope of a defendant class, and to protect the absent members by means of presenting typical defenses to the whole class.¹¹⁸

The fourth prerequisite for certification of any class action is that “the representative parties will fairly and adequately protect the interests of the class”.

The adequacy of representation is the most complex prerequisite and reveals the basis of the collective litigation, *e.g.*, one or more persons litigating in the name of a crowd.¹¹⁹

Accordingly, it is consistent with the due process of law clause, by which an individual can not be bound by a judgment where he was not a party to, or, had had an opportunity to intervene.¹²⁰

¹¹⁵ *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d. 461, 465 (9th Cir. - 1975).

¹¹⁶ 489 F.2d. 461, 466 (9th Cir. - 1975). For the application of the juridical link doctrine, *see, Monaco v. Stone*, 187 F.R.D. 50, 62 (D.C.NY. – 1999) (certifying defendant class); *Barker v. FSC Securities Corp.*, 133 F.R.D. 548, 553 (D.C. Ark. – 1989) (certifying defendant class); *Coleman v. McLaren*, 98 F.R.D. 638, 654 (N.D. Ill. – 1983) (certifying defendant class); *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 690 (D.D.C. – 1977) (certifying defendant class); *Leer v. Washington Educ. Ass’n*, 172 F.R.D. 439, 447-9 (D. Wash. – 1997); *Mudd v. Busse*, 68 F.R.D. 522, 527-8 (N.D. Ind. – 1975) (denying defendant class certification).

¹¹⁷ *See, generally, Note, The Juridical Links Exception to the Typicality Requirement in Multiple Defendant Class Actions: The Relationship between Standing and Typicality*, 58 B.U. L. Rev. 492 (1978).

¹¹⁸ Comments, 33 U.C.L.A. L. Rev. 283, 303-5 (cited in note 59). *See, also, Wright-Miller-Kane, Federal Practice*, §1770, 484-6 (cited in note 79); Conte-Newberg, *Newberg on Class Actions*, §4:66, 401 (cited in note 84).

¹¹⁹ For different theories explaining the conception of representative lawsuits, *see, e.g., Developments in the Law: Class Actions*, 89 Harv. L. Rev. 1318, 1329-72 (cited in note 59); Fiss, 53 Wash. & Lee L. Rev. 21, 24-6 (cited in note 34).

¹²⁰ *See, International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In a plaintiff class actions context, the Supreme Court has established that due process of law is observed when the interests of the class are duly represented by the named party:

“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented, though absent, which would satisfy the requirements of due process and full faith and credit”.¹²¹ (emphasis added and citations omitted)

Particular questions concerning the adequate representative in defendant class actions, originate special analysis and “closer scrutiny” in order to ascertain if the named parties can actually protect, fairly and adequately, the interests of the entire class.¹²²

There are three foremost concerns related to the choice of adequate representative in defendant class actions: (i) the choice of the representative is made by the plaintiff; (ii) the absence of incentive for any defendant to bare the expenses of defending a lawsuit on behalf

¹²¹ *Hansberry v. Lee*, 311 U.S. 32, 42-3 (1940). See, also, *Management Television Systems, Inc. v. Nat’l Football League*, 52 F.R.D. 162, 164-5 (E.D. Pa. – 1971) (defendant class action).

¹²² Wright-Miller-Kane, *Federal Practice*, §1770 4 76 (affirming “some special problems or questions have surfaced that require particular attention [to check the adequacy of the defendant representative] (cited in note 79); Conte-Newberg, *Newberg on Class Actions*, §4:66, 401 (cited in note 84); Wolfson, 38 Ohio St. L. J. 459, 478 (affirming that “problems of adequacy are more serious in defendant class actions than in plaintiff class actions”) (cited in note 98); Comments, *Federal Rule of Civil Procedure 23 Class Action in Patent Infringement Litigation*, 7 Creighton L. Rev. 50, 59-60 (1973) (discussing the problems inherited to defendant class in patent litigation context); Theodore W. Anderson and Harry J. Hoper, *Limiting Relitigation by Defendant Class Actions from Defendants Viewpoint*, 4 Marshall J. Prac. & Proc. 200 (1970-1971) (urging the parties and the courts for special considerations about class representatives in defendant actions); Kalven and Rosenfield, 8 U. Chi. L. Rev. 684, 697 n. 39 (cited in note 93).

of the entire class when the costs of litigation are disproportionate to the representative party's stake; (iii) the difficulty to compensate class counsel for the benefits conferred upon the class.

It is very well known the phrase of Professor Chaffee Jr. that: "It is a strange situation where one side picks out the generals for the enemy's army", implying that the plaintiff would select a weak representative for the defendant class.¹²³

However, the plaintiff's choice of an incapable class representative shall be challenged by any absent members, fact that would jeopardize a favorable adjudication to the plaintiff.¹²⁴

Likewise, the court has a broad power to conduct the action (Rule 23(d)) in order to maintain the class action procedure "fair and efficient", as affirmed in the Advisory Committee Notes.

Hence, the court may replace the class representative in circumstances where he does not prosecute vigorously the class defense, or, has a conduct in conflict with the class interests. Also, the court may permit intervention of a new representative in addition to the current one, or, just designate another person to represent the class.

Similarly to the appointment of an interim class counsel (Rule 23(g)(2)(A)), the same procedure may be adopted in relation to the class representative, moreover, in defendant class actions where the indication had been made by the plaintiff.¹²⁵

The other two problems involve directly the incentives for the class attorney to assume the lawsuit. Only economy of scale in investment in the lawsuit can overcome the problem of the reluctance of defendants to assume the litigation as class representative. This objective is achieved with incentives for the class counsel through an optimal mechanism of compensation for his performance.¹²⁶

b) Rule 23(b) Maintenance of the Class Action.

¹²³ Chafee, *Some Problems of Equity*, 237(cited on note 5 6).

¹²⁴ *See*, Wolfson, 38 Ohio St. L. J. 459, 478-82 (cited in note 98).

¹²⁵ Cf. MCL, 4th, §21.26, 277. *See*, In re *Telectronics Pacing Systems*, 172 F.R.D. 271 (S.D. Ohio – 1997); *Shankroff v. Advest, Inc.*, 112 F.R.D. 190 (S.D. N.Y. – 1986).

¹²⁶ *See*, Part IV, A and D, *infra*.

The prerequisites of the Rule 23(a) are a necessary condition to each and every class action, either of plaintiffs' or defendants', or, even bilateral suit, but they are not a sufficient condition to the maintenance of a collective litigation.

In this section we are going to focus on the additional elements described in Rule 23(b), that have to be fulfilled for the use of the defendant class action, and which give rise to distinct types of class actions, on account of diverse objectives of each one.¹²⁷

Defendant class actions have been certified under all the subdivisions of Rule 23(b). It is noteworthy that, recently, one commentator has stressed out the lack of solid doctrinal bases for class action categories specified in Rule 23(b), blurring them together and promoting its manipulation by litigants and courts.¹²⁸

The class actions regulated in subdivisions 23(b)(1) and 23(b)(2) are considered to be mandatory, that is, every member of the class shall be bound by the judgment. Consequently, there is no option to the class members to be excluded from the lawsuit.

The rationale is to avoid the risk of inconsistent judgments in relation to the parties, creating incompatible standards of conducts, or, the possibility of impairment or impediment to some of the class members to exercise or protect their interest, should individuals' lawsuits be filed.

¹²⁷ **Rule 23(b) – Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of:
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

¹²⁸ Linda Mullenix, *New Millenium and the Blurring of Categorical Imperatives*, 2003 U. Chi. Legal F. 177, 185, 214-38, 243-6 (2003).

For this exactly reason, Professor Kaplan has denominated as “natural” or “necessary”, classes certified under Rule 23(b)(1) and (b)(2).¹²⁹ It is necessary or natural that people in equal circumstances should be treated equally. Otherwise, the principle of justice and the courts themselves would be disrespected. Those elements, in certain way, describe the provisions for necessary joinder of parties stated in Rule 19, of the Fed. Rule of Civ. P.¹³⁰

The avoidance of incompatible adjudication of rights, among individuals placed in the same situation, is one of the goals of the class actions.

Defendant class actions have been certified in both subdivisions 23(b)(1)(A) and 23(b)(1)(B).

Certification of defendant classes under Rule 23(b)(1)(A) is made in order to impose a compatible pattern of conduct to the to the plaintiff in relation to the defendants.

The objective of the provision is to try to avoid inconsistent or varying adjudications with respect to individual defendant. The reason is that multiple lawsuits, instead of one collective procedure, would establish incompatible standards of conduct for the party opposing the class (that means, to the plaintiff).

The functional utility of 23(b)(1)(A) defendant class actions has been remarked in patent infringement cases, due offensive collateral estoppel doctrine conceived by the Supreme Court in *Blonder-Tongue Laboratories Inc., v. University of Illinois Foundation*.¹³¹ In such a case, the judicial decree of invalidity of a patent could be used as collateral estoppel against the original plaintiff in any other future suit.¹³²

Anyhow, some authorities have decided that there is not an incompatible standard of conduct if a “plaintiff patent-holder may be required to act differently with respect to different parties if the validity of its patent is upheld in one case and rejected in another, the plaintiff would not be subjected to incompatible standards of conduct. Incompatibility would exist

¹²⁹ Kaplan, 81 Harv. L. Rev. 356, 386 (cited in note 93).

¹³⁰ Geoffrey C. Hazard, Jr, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum L Rev 1254, 1259-60 (1961).

¹³¹ 402 U.S. 313 (1971). *See, also*, Wolfson, 38 Ohio St. L. J. 459, 474 and n. 72, 475 and n. 74 (cited in note 98).

¹³² *See*, the application of the offensive collateral estoppel in securities context: *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

only if one court order permitted the enforcement of the patent against an alleged infringer and another court order prohibited the enforcement of the patent against that same alleged infringer. The party opposing the class would not have to violate one judgment in order to satisfy another judgment”.¹³³

It seems that this interpretation is in conflict with the express provision of the statutes, and also its goal, notwithstanding, being illogical. The legal rule is based on the logic law of the excluded middle (*tertium non datur*): either the patent is *valid and enforceable* against everyone, or, it is *invalid and unenforceable* to everybody; there is not a third option. This is the reason that the subject matter “necessarily” has to be decided in a homogenous way to the whole class of alleged patent infringer. The incompatible standard of conduct to the plaintiff would occur if, at the same time, the patent could be enforced and could not be enforced.

Defendant class actions have also have been certified, under the subdivision 23(b)(1)(A), in securities litigation context.¹³⁴

The Rule 23(b)(1)(B) contemplates defendant class actions because the prosecution of separate actions against individual members, while not technically concluding the other members, might do so as a practical matter. Here, there is not a risk of inconsistent adjudications due to separate suits; rather, without the class action procedure, absent class members shall have their interests impaired or impeded.

The Advisory Committee Note has expressly affirmed the utilization of *class actions by or against representative members*, under the theory of “limited fund”: “In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed

¹³³ Cf. 5 *Moore’s Federal Practice*, §23.41 (cited in note 74); *Winder Licensing, Inc. v. King Instrument Corp.*, 130 F.R.D. 392 (N.D. Ill. - 1990); *Webcraft Technologies, Inc. v. Alden Press., Inc.* 228 U.S.P.Q. (BNA) 182 (N.D. Ill. - 1985).

¹³⁴ See, e.g., *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. - 1986); *Weinberger v. Jackson*, 102 F.R.D. 839 (N.D. Cal. - 1984); *McFarland v. Memorex Corp.*, 96 F.R.D. 357 (N.D. Cal. - 1982); *In re Intel Sec. Litigation*, 89 F.R.D. 104 (N.D. Cal. - 1981). But, compare, *In re Seagate Technologies Sec. Litigation*, 115 F.R.D. 264 (N.D. Cal. - 1987).

by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem”.

Nonetheless, defendant classes have been certified in “limited fund” cases in very special circumstances, once it is rare that defendants are seeking money from a fund as it is usual to plaintiff classes.

The first one concerns interpleader defendant classes where, for example, the plaintiff seeks to distribute funds from trust to the defendants.¹³⁵ The second situation is related to a “common fund” from insurance policies for professional liability. Here, separate lawsuits against the partners may drains the common policy, making those that are prosecuted in the future to bare their own court’s adjudication and litigation costs.¹³⁶

In another circumstance, courts have certified defendants classes, based on Rule 23(b)(1)(B), in litigations concerning property rights.¹³⁷

Rule 23(b)(2) primary concern is with the type of relief sought. The intention is to provide final injunctive or declaratory relief as the rule states: “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole”.

The Advisory Committee Notes explained that the subdivision is not intended to cases where the plaintiff is, “exclusively or predominantly”, seeking money damages.

Some courts have interpreted literally the Rule 23(b)(2), asserting that “the party opposing the class” should be understand as the defendant opposing the plaintiffs’ class, hence precluding defendant class actions.¹³⁸

¹³⁵ See, e.g., *United States Trust Co. v. Alpert*, 163 F.R.D. 409 (S.D. NY. – 1995); *Northern Natural Gas Co. v. Grounds*, 292 F. Supp. 619 (D. Kan. – 1968). See, also, Notes, 91 Harv. L. Rev. 630, 634 n. 22 (cited in note 98).

¹³⁶ See, e.g., *In re Chambers Dev. Sec. Litigation*, 912 F. Supp. 822 (W.D. Pa. – 1995); *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583 (S.D. Ohio - 1987).

¹³⁷ See, e.g., *Canadian St. Regis Band of Mohawk Indians v. New York*, 97 F.R.D. 453 (N.D. N.Y. - 1983); *Cayuga Indian Nation v. Carey*, 89 F.R.D. 627 (N.D. N.Y. - 1981); *Oneida Indian Nation v. New York*, 85 F.R.D. 701 (N.D. N.Y. – 1980).

¹³⁸ See, e.g., *Tilley v. TJX Cos.*, 345 F.3d 34 (1st Cir. – 2003); *National Union Fire Ins. Co. v. Midland Bancor*, 158 F.R.D. 681 (D. Kansas – 1994); *Henson v. East Lincoln Township*, 814 F. 2d. 410 (7th Cir. – 1987).

This construction is not in accordance to the provision of Rule 23, where in many subdivisions expressly prescribe for both plaintiff and defendant, such as: 23(a); 23(a)(3); 23(b)(1); 23(b)(3); and, 23(d).

Some commentators have considered “party” as the plaintiff’s class, collectively, in the context of bilateral civil rights litigation.¹³⁹ Another has argued that the useful approach to certified defendant class actions is to employ the “juridical link test”.¹⁴⁰ It seems correct that the singular reference to “party” in Rule 23 should normally be construed as also including the plural unless expressly provided in the contrary.¹⁴¹

The most relevant domain of law that defendant class actions have been certified, under Rule 23(b)(2), is pertaining to civil rights.¹⁴² But there are cases involving housing or property rights¹⁴³, government benefits¹⁴⁴, and sex discrimination¹⁴⁵.

The 23(b)(3) class action principal difference from the preceding ones is the mechanism for members of the class to opt out of the litigation, obviating the binding effect of the aggregate judgment. Therefore, it is said this type of class actions “is not particularly suited to defendant classes, because members of Rule 23(b)(3) classes have the right to opt out of a class judgment”.¹⁴⁶

Notwithstanding, defendant class actions have been certified under Rule 23(b)(3).¹⁴⁷

¹³⁹ Comments, 33 U.C.L.A. L. Rev. 283, 305 (cited in note 98); Note, *Class Standing and the Class Representative*, 94 Harv. L. Rev. 1637, 1651 (1980).

¹⁴⁰ Note, *Certification of Defendant Class Actions under Rule 23(b)(2)*, 84 Colum. L. Rev. 1371 (1984).

¹⁴¹ Cf. Conte-Newberg, *Newberg on class action*, §4:6698 (cited in note 84).

¹⁴² See, e.g., *Marcera v. Chinlund*, 595 F.2d 1231 (2nd Cir. – 1979); *United States v. Rainbow Family*, 695 F. Supp. 314 (E.D. Texas – 1988); *McKay v. County Election Comm'rs*, 158 F.R.D. 620 (E.D. Ark – 1994).

¹⁴³ *Metropolitan Area Housing Alliance v. U. S. Department of Housing and Urban Development*, 69 F.R.D. 633 (N.D. Ill. – 1976).

¹⁴⁴ *Luyando v. Bowen*, 124 F.R.D. 52 (S.D. N.Y. – 1989).

¹⁴⁵ *Kane v. Fortson*, 369 F. Supp. 1342 (N.D. Ga. – 1973).

¹⁴⁶ Conte-Newberg, *Newberg on class action*, §4:67, 405 (cited in note 84). But, compare, Note, 91 Harv. L. Rev. 630, 635 (cited in note 98).

¹⁴⁷ See, e.g., *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F. 3d. 473, (2nd Cir. - 1995); *Alvarado Partners, L.P., v. Mehta*, 130 F.R.D. 528 (D. Colo. – 1990); *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 528 (S.D. Fla. – 1986); *In re Gap Stores Securities Litigation*, 79 F.R.D. 283 (N.D. Cal. – 1978); *Williams*, 89 F.R.D. 287, 294 (cited in note 98).

In this sense, evidence that opting out of a defendant class action would make everyone worse off (members that opt-out; members that stay in, and, plaintiffs), has been produced throughout this work.

The Advisory Committee Note asserted that the last type of class action prescribed in the Rule 23(b)(3) “encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results”.

A defendant class action should be maintained under Rule 23(b)(3), if common questions predominate over the questions affecting individual members, and the collective procedure is superior than any other methods to deal with the case, so that it ought to confer “fair and efficient adjudication of the controversy”.¹⁴⁸

IV. The Optimal Aggregation of Defendants

A. Exploiting Investment and Economy Scales in the Aggregation of Defenses

As we have argued, optimal law enforcement system to confer individuals’ ideal well-being is only achieved by aggregation of claims and defenses.

It is true that separate litigation, *i.e.*, case-by case litigation, precludes economy of scale for the plaintiffs, undermining deterrence and compensation functions of the law. Only mandatory aggregation of claims breaks the asymmetric advantage that defendants have over plaintiffs, which skews adjudication in favor of the former.¹⁴⁹

Also, the lack of aggregation of defendants precludes the plaintiff, in a single class action, to obtain adjudication of liability against several wrongdoers, for instance, in case of various environmental polluters firms.

So far, the advantages of defendant class action are not limited to the plaintiffs bar. It is our understanding that the defendant class action is operational, functional, either for

¹⁴⁸ See, Weinstein, 9 Buff. L. Rev. 433, 438-54 (cited in note 93).

¹⁴⁹ Rosenberg, 2003 U. Chi. Legal F. 19, 27 (cited in note 21).

plaintiffs or defendants. The same phenomenon that affects plaintiffs, in most of the mass tort litigation, where a defective design of a product or service, provided by a firm, affect innumerable victims, may be present within a dispersed class of defendants threatened with nuisance value suits by one or more plaintiffs.

Alba Conte and Herbert Newberg have challenged the general assertion that Rule 23(b)(3) is unsuitable to defendant class actions, because the high probability of numerous members opting out of the class:

“In fact, some circumstances will actually create incentives not to opt out of a defendant class. For example, a plaintiff who commences a defendant class against a group of underwriters of a new stock offering may also threaten and be able to commence litigation against each of the underwriters individually. Given the certainty of having to make a choice between remaining in a defendant class or defending individual litigation, the economics of a joint defense considerably outweigh those of defending an individual action, and defendant class members would have an incentive to remain in the class”.¹⁵⁰

Despite of the validity of the argument, our proposal moves further urging that the optimal economy of scale for investment in litigation requires the compulsory reunion of the defendants and their defenses.¹⁵¹

It is a general consensus that the primary advantage of class actions is to override the transactional cost of low stakes claims, which would not be individually prosecuted because the costs of litigation (process and judicial expenses and attorney’s fees) supersede the expected utility from the adjudication.¹⁵²

¹⁵⁰ *Newberg on Class Actions*, §4:62, 385 (cited in note 84). See, also, Part III, B.1.(b), *supra*.

¹⁵¹ See, Holo, 38 UCLA L. Rev. 223, 266 (cited in note 108) (proposing an alteration of Rule 23, of Federal Rules of Civil Procedure in order to prohibit defendant members from opting out of the class action, nevertheless, without further theoretical rationale).

¹⁵² See, generally, *Developments in the Law – Class Actions*, 89 Harv. L. Rev. 1318, 1355-9 (cited in note 59).

Nevertheless, there are some criticisms against this position asserting that, instead of promoting judicial and process economy, class action increases litigation. Various arguments shall evidence to the contrary.

The first refusal arises from the lack of parameter of comparison and thus statistics to justify the assertion that the level of filing suits increments due to class actions, in detriment of promoting economy of judicial resources.¹⁵³

In addition, the deterrent effect of the law multiplies with the amplified probability of filing a lawsuit. Consequently, there is a decrescent number of individuals engaging in the violation of the law, that would give rise to potential lawsuits .¹⁵⁴

Secondly, the critique passes by the fact that collective litigation of low stakes claims, operates the deterrent function of the law, besides compensation.¹⁵⁵ Wrongdoers will not take appropriate steps to prevent harm if they are aware that, due to transactional costs, it is unlikely that the victims will bring lawsuits against them. This situation evidences that, notwithstanding the size of the stake of the claim, the absence of vindication produces an under-deterrence effect.

Thirdly, and the most important reasoning is that this argument seems to be eluding that judicial economy is just one of the principles that guides collective litigation.

Although class action has at one time multiples goals: equilibrate the parties in litigation; access to justice; deterrence or policing behaviors; and, avoidance of incompatible adjudication, in some situations, an order of priority has to be established.

That does not mean that the other goals are to be unconsidered. The goals of aggregation of claims and defenses are principles that north the enhancement of the law, therefore, all have the same strength or status, and no one shall eliminate the other. However, in some circumstances, one goal has to bestow prominence to another.

¹⁵³ See, John Coffee Jr., *Class Wars: The Dilemma of Mass Tort Class Action*, 95 Colum L. Rev. 1343, 1347 (1995).

¹⁵⁴ Professor Posner states: “The likelier a suit is, the greater is the deterrent effect of whatever legal principle the suit would enforce, and hence the less likely the potential defendants to engage in the forbidden conduct that would create a right to sue”, Posner, *Economic Analysis of Law*, 585 (cited in note 24).

¹⁵⁵ See, Rosenberg, 2003 U. Chi. Legal F. 19, 30 n. 24 (cited in note 21); Posner, *Economic Analysis of Law*, 586-7 (cited in note 24); Kalven and Rosenfield, 8 U Chi. L. Rev. 684, 686 (cited in note 93).

If there is a conflict within the goals of the collective litigation the preference for an optimal law enforcement system must select which one should prevail: in our view the access to justice takes primacy, preponderating over judicial economy.¹⁵⁶

In relation to high stake claims, it is argued the importance of allowing class members to opt-out of the lawsuit certified under the Rule 23(b)(3). By definition, high stake claims are those that would be individually viable, albeit the existence of class action procedures.

This line of reasoning follows the “anti-redistribution principle” (expression created by Professor Rosenberg), that has been established by the Supreme Court in *Amchem v. Windsor*¹⁵⁷, which “determines the “fairness” of using Rule 23(b)(3) to resolve claims by trial or settlement”.¹⁵⁸

Briefly, the “fairness test” requires that class members recoveries, with high stake claims, should reflect their expected value claims, under the separate action market, therefore, justifying the opting-out of the class.¹⁵⁹

Anyhow, the marketability of a claim in a separate action, instead of in a collective procedure, takes into consideration, others, and more important, factors, as litigation costs, and, litigation risks, both measured in accordance to types and difficulty of proof; complexity of the law; the facts and related public policies etc.¹⁶⁰

At this point is important to remember that allowing individuals to alter to *ex post* preferences, that are diametrical opposite and mutually exclusive to their previous choices *ex ante*, disrupts the optimal legal system for law enforcement, undermining the deterrence

¹⁵⁶ See, Jones, *Theory of Class Actions*, 82-3 (cited in note 35).

¹⁵⁷ 521 U.S. 591 (1997).

¹⁵⁸ *Id.*, 22. See, also, Rosenberg, 115 Harv. L. Rev. 831, 838 (cited in note 21).

¹⁵⁹ See, excerpt of the Report of the Judicial Conference Committee on Rules of Practice and Procedure: “(...) the second opt-out opportunity gives class members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits. This proposal introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation. (...) [a] second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. The proposed second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable and adequate. It is just the sort of “structural assurance of fairness”, mentioned in *Amchem Products Inc.*, that permits class actions in the first place”, *Report*, 8, available at <http://www.uscourts.gov/rules/supct1202/ExcerptCV.pdf> (last visited on May, 3rd, 2006).

¹⁶⁰ Rosenberg, 115 Harv. L. Rev. 831, 838 n.19 (cited in note 21).

objective of collective adjudication and increasing litigation costs and risks, and, does not provide any increased benefits for compensation.¹⁶¹

Other aspect of transactional costs of litigation that commentators have given very little attention, or even better, its total lack of analysis, is of aggregation of low stakes defenses.

The deficiency of fully exploiting investment and economy scales in litigation, due to fractional aggregation is not an event that exclusively plaintiff's incur.

Even in a situation of dispersed plaintiffs, filing multiple individual lawsuits, the absence of mast tying as in mandatory class action, impedes the defendant to maximize his economy and investment in litigation.¹⁶²

In certain circumstances, the defendant can invest once and for all, as preparing experts' opinions or depositions. However, in others, several and overlapping lawsuits may provoke a substantial increment of coordination costs. This augment is a result of the managing costs for several actions, throughout different jurisdictions, employing different lawyers or law firms, with varied experts, incurring in increased expenses with transportation and accommodations for witnesses etc.¹⁶³

Moreover, the situation is more acute when there are innumerable dispersed defendants, with common defenses, either facing a plaintiff class action or multiple individual lawsuits. Mandatory aggregation of defendants confers optimal scale of investment and economy with optimal incentives to class representative as well as the class counsel.

Any violation or abuse of the law has to be rectified, and the value of adjudication functions either in favor of prospective plaintiffs or of defendants.¹⁶⁴

¹⁶¹ See, Part II, B, *supra*.

¹⁶² See, Part II, C, *supra*.

¹⁶³ Professor Rosenberg points out that even firms with close and long-standing pre-litigation commercial relationships incur in high expenses in coordination of actions, as for example the Firestone Tire/Ford Explore litigation. He adds that courts can impose the aggregation of defendants, in a defendant class action, "to overcome collective action problems and costs that prevent multiple defendants from fully exploiting scale economies, thereby promoting defendants' optimal investment in developing shared positions on common questions", Rosenberg, 2003 U. Chi. Legal F. 19, 28 n. 22 (cited in note 21).

¹⁶⁴ See, Assaf Hamdani and Alon Klement, *The Class Defense*, 93 Cal. L. Rev. 685, 708-9 (2005).

In an optimal law enforcement system, it is not socially and individually desirable that claims or defenses are not vindicated for the sole reason of litigation transactional costs, which makes economically unviable to file a lawsuit or to present a legal defense.¹⁶⁵

Ideal welfare to individuals is obtained with economy of scale in investment in litigation. Aggregation of claims and defenses confers the ideal investment either for plaintiffs or defendants, in collectivized procedures. It is irrelevant the dimension of the claims at stake: either low or high. Further, it is functional indifferent if the lawsuit concerns to a class of plaintiffs or defendants, or both. Even more, it is operational meaningless, for the best law enforcement, if the purpose of the certification of a defendant class action serves the interests of the plaintiffs or of the defendants.¹⁶⁶

B. Nuisance Value Suits

The defendant class action is more frequently used as a procedural device for the plaintiffs. However, it is a strong instrument to avoid nuisance value lawsuits to be used by defendants, creating a class action in individual lawsuits brought by plaintiffs.

Nuisance value suits, or negative value suits, may be put into a model design described as a lawsuit where the expected benefits of litigation would be outweighed by its costs.¹⁶⁷

Further, it is a model of litigation where there is a presumptively small cost for the plaintiff to bring the suit, and a relatively high cost for the defendant to defend himself.¹⁶⁸

¹⁶⁵ For example, several clients do not file lawsuits in order to be refunded of illegal banking charges, or, numerous individuals prefer to settle when threatened with nuisance value suits alleging television signal piracy despite of the fact that they had not commit any violation or have a consistent defense.

¹⁶⁶ As we have continuously sustained that the defendant class actions may serve either the interests of a class of plaintiffs or a class of defendants. *See, also, Part IV, B, C, D, infra.*

¹⁶⁷ Shavell, *Foundations of Economic Analysis of Law*, 420 (cited in note 25).

¹⁶⁸ *Id.*, 422. *See, also, Randy J. Kozel and David Rosenberg, Solving the Nuisance-Settlement Problem: Mandatory Summary Judgment*, 90 Va. L. Rev. 1849, (2004) (defining nuisance-value settlement as “a payoff extracted by a threat to litigate meritless claim or defense that both parties know the court would readily dismiss as ‘untrialable’ or otherwise legally untenable on an applicable dispositive motion for merits review, like a motion for summary judgment”, and, proposing a mandatory summary judgment to resolve it).

So, in a lawsuit characterized as a nuisance value suit, the plaintiff will likely file the action, but unlikely will go to trial, and, the defendant will probably settle for any amount inferior to his costs to present a defense.

The situation is better illustrated with numeric examples, furnished by David Rosenberg and Steven Shavell.¹⁶⁹

Imagine, for example number one, a plaintiff that has a low expected utility from a judgment corresponding to 1% of \$1,000. His cost to file a lawsuit is only \$30 and an additional cost of \$150 if he goes to trial. On the other side, the defendant would bear a \$200 to present his defense.

As we have sketched the case, the plaintiff is willing to file the lawsuit as its cost is very low. In doing so, the defendant is facing an expense of \$200 to defend himself. Therefore, he is willing to settle for any amount below his litigation costs.

The outcome is the defendant settling with the plaintiff in order to avoid the cost of the defense. He realizes an expected utility from settlement in comparison to higher costs of litigating the case.

The plaintiff is also looking for a settlement, as he is unwilling to go to trial because the case is weak and the cost of trial (\$150) supersedes the adjudication of the judgment (1% of \$1,000 = 10). The filing expenses are a sunk cost that he does not care anymore at this phase of the procedure.¹⁷⁰ We are assuming that the plaintiff is risk-neutral or risk-averse, but not a bluffer to try to risk a chance of the defendant choosing to litigate instead of settling. In this case, the amount for settling has to be one that gives the plaintiff certainty that the defendant will agree with, so the value has to be any value inferior to \$200. Also, it is irrelevant for the settlement if the defendant has information about the strength of the plaintiff's case, considering that the amount for settlement is going to be less than the defense cost.

¹⁶⁹ David Rosenberg and Steven Shavell, *A Model in Which Suits are Brought for their Nuisance Value*, 5 Internat. Rev. Law and Econ. 3, 4-6 (1985). See, also, Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. Legal Stud. 1 (1996) (arguing that legal costs are not incurred at once but in stages and this divisibility increases the likelihood of plaintiffs to sue or threat to sue defendants, even if the costs of litigation, at the beginning of the litigation, exceeds the expected judgment amount).

¹⁷⁰ See, Posner, *Economic Analysis of Law*, 7 (cited in note 24).

Any other conduct of the parties would be irrational. If the defendant does not settle nor appears in court to defend himself, he will lose of \$1,000 by a default judgment. If the defendant litigates, he would bear a cost of \$200, instead of a settlement agreement for any amount below this. The plaintiff, on the other hand, would probably withdraw the case and avoid spending more \$150 at trial for an expected judgment of only \$10.

We emphasize that the mere threat of filing a lawsuit is enough to obtain the settlement, because the threat is verisimilar under an economic analysis, hence making the plaintiff eager to bring the action in case an out-of-court settlement is not reached.

Assume another example, where the plaintiff has a high expected utility from the judgment, corresponding to 70% of \$300, with a trial cost of \$250. The costs for filing the suit and the defense remain the same, respectively, \$30 and \$200. There is no qualitative difference from the first example, because the defendant would settle for any value inferior to the amount of his litigation costs (\$200). On the plaintiff's side, he would be willing to file the suit if he does not get an out-of-court settlement (costs of only \$25). But also, he does not want to go to trial even possessing a merit case, once the trial costs (\$250) overcome the expected adjudication of \$210 (70% of \$300 = \$210).

According to the adopted definition, situations where the plaintiff has a merit case, with high expectation from the judgment that overrides the costs of litigation, making him eager to go to trial, would not be considered a nuisance value suit.¹⁷¹

The above assertions were made focused in the individual lawsuits. On cases where there are innumerable and dispersed defendants, there is a major incentive for the collectivization of the defenses, in order to achieve economy of scale to invest in the litigation instead of settle in a negative value suit.

Assume that a plaintiff is suing or threatening to sue 100 people to obtain nuisance-value settlements. Suppose these figures for each individual litigation: (i) \$500 - costs to file each suit; (ii) \$1,500 – trial costs; (iii) \$4,000 – defense costs; (iv) \$2,000 – plaintiff's offer to settle; (v) 1% of 100,000 = \$1,000 - expected judgment.

As we have argued, any single defendant would rather settle than litigate, even though the plaintiff has a weak or meritless case. Anyhow, aggregating all defendants, considering

¹⁷¹ See example at Rosenberg and Shavell, 5 *Internat. Rev. Law and Econ.* 3, 5 (cited in note 169).

that the above numbers maintained unchanged, the cost per-defendant is \$40, what incentives the defendants not to settle, but rather litigate.

Regardless of the fact that defendant class actions are more frequently used for plaintiffs, and on their own interests, the goals of collective litigation – access to justice, equilibrium within the parties in litigation; deterrence or policing behaviors; and, avoidance of incompatible adjudication - are also achieved by the defendants' requirement for aggregation of the their class.

In *Otero v. New York City House Authority*, the district court filed an order permitting the intervention of 171 defendants, that moved for a defendant class action, which was certificate due impracticability of joinder, common questions at law, and, typicality of claims.¹⁷²

This precedent evidences, although rare, that a defendant is allowed to move for certification of a class, which should reach optimal economy of scale in litigation by forbidding members to opt-out of the class.¹⁷³

Alternatively, the defendants may step upfront and file, with the exactly same advantages, a class action for declaratory and or injunctive relieves.

For example in the DirecTV case¹⁷⁴, a class of consumers filed a class action lawsuit against DirecTV, claiming that the satellite television provider violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, by mailing demand letters that accused plaintiffs of illegally accessing the provider's signal. The U.S. District Court for the Central District of California dismissed the action on the basis that the provider's sending of the letters was conduct immunized from RICO liability under the Noerr-Pennington doctrine. In upholding the trial court's judgment, the U. S. Court of Appeals for the Ninth Circuit held that RICO and the predicate statutes at issue did not permit the maintenance of a lawsuit for the sending of a prelitigation demand to settle legal claims that did not amount to a sham. Because the demand letters at issue sought settlement of claims

¹⁷² 354 F Supp 941, 945 and n.7 (1973).

¹⁷³ See, Part II, C, *supra*.

¹⁷⁴ See, Part I.

against plaintiffs under the Federal Communications Act, and no sham was claimed, they could not form the basis of liability under RICO).¹⁷⁵

A different use of defendant class action was employed in *Georgia Power Co. v. Hudson*¹⁷⁶, where the plaintiff, a public service company that operated a power dam, filed a suit to enjoin the prosecution by defendants, owner of lands lying along the river below the dam, of a number of actions for damages based on the plaintiff's operation of the dam overflowing bottom lands, instituted by the defendants against the plaintiff in several state courts.¹⁷⁷ In a certain manner, the objective was to consolidate all the land owners' actions brought in state courts into a federal court, what even up today is not possible.¹⁷⁸

Completely diverse from our line of argumentation, concerning the aggregation of defendants and their common defenses, it is the possibility that a single defendant, in a plaintiff class action, file a counterclaim creating a defendant class action (or more precisely a bilateral class action). The counterclaim, as is the proper name of the institute indicates, is a "pleading which sets forth a claim for relief" (Rule 8(a), Fed. R. of Civ. P.), which discipline is established in Rule 13, of the Federal Rules of Civil Procedure.¹⁷⁹

¹⁷⁵ *Sosa v. DirecTV, Inc.*, 437 F. 3d 923 (2006).

¹⁷⁶ 49 F 2d 66 (4th Cir. - 1931).

¹⁷⁷ The suit has been dismissed based on three different grounds: failure to meet the jurisdictional amount requirement; federal courts were forbidden by statute (28 USCA §379) to enjoin state court actions; and, federal court of equity has no jurisdiction, for the purpose of avoiding a multiplicity of suits, to enjoin the prosecution of such actions, irrespective of the court in which they are pending (note that the decision is dated before the enactment of the Federal Rules of Civil Procedure that unified procedures in law and at equity, *see*, Part III, A.2.(c)).

¹⁷⁸ There is not a procedural mechanism, as the Multidistrict Litigation Panel – MDL, that allows coordination of federal civil cases and reunion of them for united discovery, under the 28 U.S.C. §1407. *See*, Klonoff, *Class Action in a Nutshell* 371 et. seq. (cited in note 109). In the MCL 4th, §20.31, 230, is stated: "No single forum has jurisdiction over these groups of cases. Unless the defendant files for bankruptcy, no legal basis exists for exercising exclusive federal control over state litigation. Interdistrict, intradistrict, and multidistrict transfer statutes and rules apply only to cases filed in, or removable to, federal court".

¹⁷⁹ *See, e.g., Blake v. Arnett*, 663 F.2d 906 (9th Cir. 1981); *Jones v. U.S. Department of Housing and Urban Development*, 68 F.R.D. 60 (E.D. La. 1975); *Cotchett v. Avis Rent A Car Sys., Inc.*, 56 F.R.D. 549 (S.D.N.Y. 1972).

Under the procedural angle, the defendant class action initiated by requirement of a defendant follows the same pattern of any class action concerning the requisites of Rule 23(a) and Rule 23(b).¹⁸⁰

The key element is the mandatory aggregation of defendants, that would halve the asymmetric advantage of plaintiff's litigation, conferring the defendants scale advantage in economy and investment, what would result in marketable defense, incentivizing class counsel to assume the defense.

C. The Individuals' Well-Being and the "Fairness" of a Day in Court

There is an idea scattered spread amongst legal operators that collectivized litigation and individuals' rights in conducting a civil action comprehend antagonist concepts.

Corresponding to this belief, the Supreme Court established that the parties, in mandatory class actions, carry the burden to justify the exception to the individuals' fairness of having a day in court, which is a "deep-rooted historic tradition":

" 'Second, and no less important, mandatory class actions aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process", *Hansberry v. Lee*, 311 U.S. 32, 40, 85 L. Ed. 22, 61 S. Ct. 115 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court' " *Martin v. Wilks*, 490 U.S. 755, 762, 104 L. Ed. 2d 835, 109 S. Ct. 2180 (9189) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); see *Richards v. Jefferson County*, 517 U.S. 793, 798-799, 135 L. Ed. 2d 76, 116 S. Ct. 1761 (1996). Although "we have recognized an exception to the general rule

¹⁸⁰ The defendant class action, certified on behalf of the defendant requirement, is superior to mandatory joinder, because this is impractical when the number of defendants is extent, and does not need any drastic modification of actual statutes. For proposal of mandatory joinder in patent litigation, see, Edward Hsieh, *Mandatory Joinder: An Indirect Method for Improving Patent Quality*, 77 S. Cal. L. Rev. 683 (2003-2004); see, also, a comparison between consolidation under multidistrict litigation panel and class action, Charles Silver, *Comparing Class Action and Consolidations*, 10 Rev. Litig. 495 (1990-1991).

when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,” or “where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate,” *Martin, supra*, at 762, n. 2 (citations omitted), the burden of justification rests on the exception”.¹⁸¹

Correspondently, as the argument goes, individuals should have the right to opt-out of class actions and individually litigate their claims and defenses.

Rhetorical as it is this “historical tradition” of an individual right of a day in court¹⁸², one commentator has even gone further affirming that the day in court is based on “natural law”:

“Underlying our tradition of individual claim autonomy in substantial tort cases is the natural law notion that this is an important personal right of the individual”.¹⁸³

Another scholar, while criticizing the “natural and inalienable” right of individual conduction of process in contrast to collectivized procedure, as “somewhat embarrassing”,

¹⁸¹ *Ortiz v. Fiberoptic Corp.*, 119 S. Ct. 2295, 2314-5 (1999).

¹⁸² For a profound and extensive critique of the “fairness of a day in court”, see, Fried and Rosenberg, *Making Tort Law*, 27-31 (cited in note 21); Rosenberg, 2003 U. Chi. Legal F. 19, 44-7, 49-55 (cited in note 21) (demonstrating the lack of deontological justification for opt-out in mass tort litigation, which would be based on satisfaction due to a right-duty relationship between the wrongdoer and the victim); Rosenberg, 115 Harv. L. Rev. 831, 863-6 (cited in note 21) (arguing that court-awarded fee to class counsel based on opportunity cost of class settlement is more cost effective than “autonomy” in order to solve the supposed collusion in class’ settlements); Rosenberg, 69 B.U.L. L. Rev. 695, 701-3 (cited in note 21) (demonstrating the absence of meaning in individual control of the litigation). See, also, Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. Legal Stud. 307, 389 et. seq. (1994) (challenging the process value of allowing individuals to be heard); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 199, 288 (1992) (arguing that the justification of a day in court is based on a process-oriented theory “that values participation for its own sake not just for its tendency to improve outcome quality” and concludes that “the assumption basic to the conventional account of the day in court ideal – that each person has an individual right to control her own lawsuit – is wrong on positive and normative grounds”).

¹⁸³ Roger H. Transgrud, *Mass Trial in Mass Tort Cases: a Dissent*, 1989 U. Ill. L. Rev. 69, 74 (1989).

still purports the “popular presupposition of individual dignity, and its political counterpart, self-determination”.¹⁸⁴

The assertion that the “first purpose of our civil justice system is and should be to offer corrective justice in disputes arising between private parties”¹⁸⁵ fails to consider that any law provision should enhance two functions, in this order: deterrence and compensation. As a result, an optimal legal system should favor deterrence of unreasonable risks and compensation solely for reasonable risks.¹⁸⁶

Even the argument that “our system operates mainly on the assumption that economic decisions are best made by the true owner of property rather than by any other person”¹⁸⁷, supposedly an economic one, does not suffice. The economics decisions, in modern society, are made by experts in managing individuals’ assets, such as it happens in corporations, governments, trade unions, investment funds, companies foundations’ funds, life insurance policies etc, as noted by Professor Craig Jones.¹⁸⁸

Of significant importance is the fact that, in most of the tort law cases, lawyers assume the risks of litigation, evidenced by contingent fees. Statistics demonstrate that 90% of tort litigation, individual or collectivized, are governed by contingent attorney fees’ agreements.¹⁸⁹

Litigation strategies under contingent fees arrangements are made on the lawyer’s assessment of expected gains and losses, hence, he will only bring a suit if the expected value to him is positive.¹⁹⁰

¹⁸⁴ Jerry L. Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication in Mathews v. Elridge: Three Factors in Search of a Theory of Value*, U. Chi. L. Rev. 28, 49 (1976-1977). See, also, Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the Ali Proposal*, 10 J. L. & Com. 1 (1990-1991); Patricia Anne Solomon, *Are Mandatory Class Actions Unconstitutional?* 72 Notre Dame L. Rev. 1627 (1996-1997).

¹⁸⁵ *Id.*, 74.

¹⁸⁶ See, Part II, C, *supra*.

¹⁸⁷ Transgrud, 1989 U. Ill. L. Rev. 69, 75 (cited in note 183).

¹⁸⁸ Jones, *Theory of Class Actions*, 74 (cited in note 35).

¹⁸⁹ Rosenberg, 62 Ind. L. J. 561, 582 (cited in note 21).

¹⁹⁰ Donald N Dewees, J. Robert S. Prichard and Michael J. Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Action*, J. Legal Stud. 155, 166 (1981). The commentators propose nine different rules for attorney’s fees with varieties between American rule (no shifting of litigation costs) and English rule (litigation

The contingent fees compensates the lawyers' legal services and the loan of such services, with a higher risk of default than ordinary market loan, remaining in cases for many years outstanding without any interest and to be repaid only and if the lawsuit is successful. Of course, these facts make the lawyers very careful in analyzing the expected value of the judgment.¹⁹¹

Even if it is true the contention that contingent fees produce a differential interest among class and class attorney (we do not consider a 'conflict of interest', because both are seeking to maximize the expected utility from the claims or defenses, according to respective position in litigation), the attorney stake in a class action is many times superior than in an individual lawsuit, what makes him invest optimally, approximating or equalizing the investment parties would do, if they were to finance their own litigation.¹⁹²

The individuals' welfare are duly protected by aggregation of claims and defenses regardless of a personal day in court. This assertion is based in the rational choice theory. Assuming that individuals are rational, seeking their optimal well-being, this is achieved by an ideal legal system through optimal precautionary measures, insurance protection, and progressive funding thereto. In addition, the model prohibits individual's self exclusion of the system, or, conducts in conflict with the system.¹⁹³

Positing aggregation of claims and defenses and the right of "a day in the court" as mutually exclusive, the assertion resembles a narrow view of the law enforcement device provided by class actions.

D. Appropriate Incentives for Class Counsel

1. The 2003 Amendment to the Rule 23 of the Federal Rules of Civil Procedure

costs shifting), and, in five of them where there is a contingent fees, the lawyers take the risks of litigation and make the decision of filing the lawsuit (*Id.*, 163-6).

¹⁹¹ See, Posner, *Economic Analysis of Law*, 584 (cited in note 24).

¹⁹² Rosenberg, 62 Ind. L. Rev. 561, 583 (cited in note 21).

¹⁹³ Only free-riders would prefer to litigate alone because their appropriation and capitalization over the works developed by the others.

In 2002, the United States Judicial Conference adopted the proposed amendments to Rule 23, of the Federal Rules of Civil Procedure, made by the Advisory Committee of the Civil Rules, after more than one decade of studies.¹⁹⁴

It is the most comprehensive modification of the discipline of the class actions, since the 1966 Amendments.¹⁹⁵

The modifications are concentrated in four major areas.¹⁹⁶ Before analyzing the new subdivisions 23(g) and (h), which concerns the appointment of the class counsel and the attorney fees award, that are the object of our proposal, it seems appropriate to make a brief comment of the previous three.

The first one considers the timing of the class certification decision under subdivision 23(c)(1), establishing that the court's decision whether to certify a class has to be "at an early practicable time", instead of the previous expression "as soon as practicable after commencement of an action".¹⁹⁷ Also, the certification decision is not anymore "conditional", and it may be altered or amended before "final judgment", instead of the "decision on the merits".¹⁹⁸

¹⁹⁴ See, Administrative Office of the U.S. Courts, News Release, *Judicial Conference Judgeship Recommendations endorsed by Administration 2* (Sept 24, 2002) available online at http://www.uscourts.gov/Press_Releases/judconf902.pdf (last visited on April 27, 2006).

¹⁹⁵ See, Mullenix, 2003 U. Chi. Legal F. 177, 177-8 (cited in note 128).

¹⁹⁶ Wright-Miller-Kane, *Federal Practice*, §1753.1, 53-4, (cited in note 79).

¹⁹⁷ According to the Manual of Complex Litigation, the 'early practical time' is considered the moment when the court has sufficient information to decide whether the action meets the certification criteria of Rules 23(a) and (b), MCL 4th, §21.133, 252-3. In addition, is important to observe the Notes of the Advisory Committee to the 2003 Amendments stating that: "Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the 'merits', limited to those aspects relevant to making the certification decision on an informed basis".

¹⁹⁸ The 2003 Amendment Notes of the Advisory Committee explained the modification, as follows: "This change avoids the possible ambiguity in referring to 'the decision on the merits'. Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation".

The second modification involves the notice provisions in subdivision 23(c)(2), authorizing the court to direct appropriate notice to the class certified under Rule 23(b)(1) or (2)¹⁹⁹, and prescribing the mandatory notice requirements under a Rule 23(b)(3) class.

The third alteration is related to the process of settlement, voluntary dismissal and compromise. Subdivision 23(e)(1)(A) clarifies that the settlement, voluntary dismissal, or compromise is concerning claims, issues, or defenses of a certified class.²⁰⁰ According to subdivision 23(e)(1)(B), in any of the mentioned situation the court must direct notice “in a reasonable manner” to all binding class members in any class certified under subdivisions 23(b)(1) or (2) or (3).²⁰¹ Also, in order to approve the settlement, voluntary dismissal or compromise, the court must find through a mandatory hearing that it is fair, reasonable and adequate (23(e)(1)(B)). Subdivision 23(e) also establishes the requirements and process for filling or objecting a settlement, voluntary dismissal or compromise.

2. The Appointment of the Class Counsel and the Attorney Fees

The fourth group of alterations made by the 2003 Amendments to the Rule 23, of the Federal Rules of Civil Procedure, deals with the appointment of class counsel and the attorney fees award.

a) Subdivision 23(g)

¹⁹⁹ Nevertheless the 2003 Amendment Notes of the Advisory Committee made it clear that: “The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice”. However, if a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

²⁰⁰ Cf. Wright-Miller-Kane, *Federal Practice*, §1753.1, 53 (cited in note 79); 5 *Moore’s Federal Practice*, §23.160 (cited in note 74).

²⁰¹ Cf. MCL 4th, §21.31, 285; §21.312, 293; Wright-Miller-Kane, *Federal Practice*, §1797.6, 196 (cited in note 79). Nonetheless, while Wright-Miller-Kane affirm that the 23(e)(1)(B) notice is not to be sent to those that have already opt-out in a 23(b)(3) (*Id.*, §1797.6, 196), in MCL 4th is asserted that even those persons should once again be notified to check their interests “to opt back into the class and participate in the proposed settlement” (*Id.*, §21.312, 294). For a broad and deep critique to this second opt-out notice in Rule 23(b)(3) classes, *see*, Rosenberg, 2003 U. Chi. Legal F. 19, *passim* (cited in note 21).

The subdivision 23(g) improved the guidelines, requisites and procedure for the appointment of the class counsel. As set by the Advisory Committee Notes, the new provision is not creating an “entirely new element”, but it is built upon the judicial experience recognizing the importance of the court’s evaluation of proposed class counsel. Before the amendment, the sole provision that north courts in selecting the class representative and counsel was that they must “fairly and adequately protect the interests of the class”, stated in Rule 23(a)(4).

To the contrary of what happens in an individual litigation, where “a client chooses a lawyer, negotiates the terms of the engagement, and monitors the lawyer’s performance”, in class actions, this task is performed by the judge “who creates the class by certifying it and must supervise those who conduct the litigation on behalf of the class. The judge must ensure that the lawyer seeking appointment, as class counsel, will fairly and adequately represent the interest of the class”.²⁰²

Hence, with almost the same contents of the subdivision 23(a)(4), concerning the class representative, the subdivision 23(g)(1)(B) establishes that “an attorney appointed to serve as class counsel must fairly and adequately represent the interest of the class”. However, this mandatory rule does not purport to supersede or to affect the interpretation of other legislation that provides otherwise. For instance, the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of §15 U.S.C.), that contains provisions that bear on selection of a lead plaintiff and the retention of counsel.

In this sense, it is valid to affirm that the class counsel, conducting the class action, has a much higher responsibility to the members of the class than a lawyer in an individual lawsuit.

²⁰² Cf. MCL 4th, §21.27, 278. The 2003 Amendment Advisory Committee Notes the same way states: “Paragraph 1(B) [of subdivision 23(g)] recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to “fire” class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court’s approval of a settlement would be in the best interests of the class as a whole”.

The new subdivision also provides a method by which the court may make directions, from the outset, about the potential fee award to class counsel in the event the action is successful (Rule 23(g)(2)(C)).

The Advisory Committee Notes asserts that “class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests”. In such a case, the logical appropriate conduct is to appoint a counsel for each different class, exactly because there are divergent interests within them, and a single lawyer would not be able to perform his duties because this conflictual circumstance.²⁰³

Moreover, the new subdivision (g)(1)(C) stipulates the issues that the court must and may consider in appointing the class counsel, serving also to inform class counsel seeking appointment, as explained by the notes of the Advisory Committee.

The court must consider: a) the work counsel has done in identifying or investigating potential claims in the action; b) counsel’s experience in handling class actions, other complex litigation, and claims in type asserted in the action; d) counsel’s knowledge of the applicable law; and, e) the resources counsel will commit to representing the class. And the court may: “consider any other matter pertinent to counsel’s ability of to fairly and adequately represent the interest of the class”, and “direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs”, and “make further orders in connection with the appointment”.

b) Subdivision 23(h)

Even though the Advisory Committee Notes affirmed that “Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions”, the new subdivision 23(h) made no substantial modification, whatsoever, to the traditional system of awarding attorney fees in class actions.

In summary, the rule stipulates the need of a motion for award of attorney fees to be made according to Rule 54(d)(2); authorizes any class member or the party whom the payment is sought to object the motion; prescribes the possibility of a court’s hearing and

²⁰³ See, MCL 4th, §21.27, 278.

findings for its conclusion and refer to a special master or magistrate judge the issues related to the amount of the award.

3. Attorney Fees Award

Although the work of the lawyer, as a class counsel in a collective litigation, has a very peculiar position differently from the position he holds in ordinary, separate litigation, the main incentive is the same in both situation: the compensation for a professional exercising his job is his fees.²⁰⁴

Putting aside other factors that may stimulate the lawyer, as personal satisfaction, social recognition, ideological, religious, or political motivations, the enticement for the work done is the fees that compensates the investment (of time, resources, expertise etc.) spent in the litigation.²⁰⁵

The plaintiff's counsel, in class actions, is usually identified as a "private attorney general", the lawyer that prosecutes actions on behalf of numerous individuals similarly situated, that they would not do it individually. It is said that the expression "private attorney general" was created by Judge Frank delivering the opinion of the Second Circuit in the case *Associated Industries of New York State v. Ickes*.²⁰⁶

Consequently, there is often a great inducement for the attorney to prosecute the action because the large expected reward.

²⁰⁴ See, Part IV, D.2.(a), *supra*.

²⁰⁵ Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 952 (1994-1995); *Developments – The Paths of Civil Litigation*, 113 Harv. L. Rev. 1827, 1829 (1999-2000).

²⁰⁶ "Instead of designating the Attorney General, or some other public officer, to bring such proceedings [to vindicate of the public or the government], Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, **private Attorney Generals**" (emphasis added), *Associated Industries of New York State v. Ickes*, 134 F. 2d. 694, 704 (2nd Cir. – 1943). See, John C. Coffee, Jr., *Understanding the Plaintiff Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986); Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, 71-3 (Rand Institute for Civil Justice – 2000) (cited hereafter as Hensler, *Class Actions Dilemmas*).

On the other hand, the attorney for a defendant class does not have much of incentive to litigate the defense for the class. This is a consequence of the absence of a system that optimizes the scale economy of aggregating the defendants to distribute the costs of the litigation among all the class members.²⁰⁷

The most conventional method of compensating the plaintiff's class counsel is the "common fund", where he creates or preserves a fund for the benefit of the whole class and is paid with money from this fund.²⁰⁸

The court award of attorney fees is justified under the doctrine that members of the class, in the collective suit, who obtained a benefit from the lawsuit without compensating for its costs, are unjustly enriched.

There are two major methods, with some variations and combinations within them, to calculate the attorney fees in "common fund" cases: (i) the "percentage method", a percentage of the fund generated by the lawyer activity; or; (ii) the "lodestar method", based on the number of hours reasonably expended multiplied by the market rate of lawyers services.²⁰⁹

Hence, in defendant class actions, where there is a preexisting common fund or an escrow account, the legal expenses that the representative party has incurred, especially the attorney fees, are to be paid from those sources.²¹⁰

Nevertheless, this is a very unlikely situation. In any lawsuit, a favorable adjudication to the plaintiff will confer him either monetary award, or, an injunctive or declaratory relief.

On the contrary, to the defendant a victory is always a declaratory judgment. The advantage that the lawyer confers upon the defendant class is to impede any money disbursement, or, to establish by the court's decision that the plaintiff has no dully rights or claims enforceable against them. There is not any money to be collected which could be partially used to compensate the lawyer's work.

²⁰⁷ See, Part IV, A, *supra*.

²⁰⁸ See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970); *Central R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trs. v. Greenough*, 105 U.S. 527 (1882).

²⁰⁹ For commentaries and critique of both methods of calculating the attorney fees, see, MCL, 4th, §14.12, 186-96.

²¹⁰ See, *Cranston v. Hardin*, 504 F 2d 566 (2nd Cir. - 1974); *German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W. 2d 705 (Mo. - 1966).

Alternatives to compensate the class counsel, based on the appointment of a wealthy class representative, or, one that has a high stake in dispute, results invariably in fractional aggregation of defendants.²¹¹

This rationale lacks consideration of the primordial scope of the collectivized procedures that is to aggregate the defendants in order to attain economy and investment scales in the litigation.

Other solution to create special interest organizations²¹² also does not suffice, especially in cases where the defendants' stakes are low, as it happens in television signal piracy (DirecTV case) or copyrighted works violated through the Internet (Grokster case).²¹³

Firstly, because there is not incentive for the aggregation of the defendants in such organizations; secondly, these sorts of associations frequently have deficient resources to engage in class action litigation.²¹⁴

The optimal law enforcement system requires mandatory aggregation of plaintiffs and defendants, and for its turn, the optimal incentive to the defendant class counsel is achieved by awarding attorney fees by means of a fee-shifting system.

The method of awarding attorney fees to the prevailing party in the litigation, by taxing the defeated party, is a rule in England and in most of civil law countries. It is often referred to as "English rule" or "indemnity rule".

²¹¹ See, e.g., Wolfson, 38 Ohio St. L. J. 459, 485-8 (cited in note 98).

²¹² We use the expression "special interest organization" because these organizations are concerned to the interest of special sector of the society. Therefore, they do not, at least all of them, seek public goals, in order to be called "public interest organizations".

²¹³ In the Internet music downloading case, a special interest organization has been created: "Electronic Frontier Foundation (EFF)". In spite of the fact that it has helped individuals in separate lawsuits brought by the copyright holders, it has not stepped up and required the certification of a defendant class. However, the Electronic Frontier Foundation (EFF) filed a class-action lawsuit against AT&T on January 31, 2006, "accusing the telecom giant of violating the law and the privacy of its customers by collaborating with the National Security Agency in its massive and illegal program to wiretap and data-mine Americans' communications" (see, its site www.eff.org, last visited on May 30th, 2006).

²¹⁴ See, Hensler, *Class Actions Dilemmas*, 71 (cited in note 206), arguing that: "(...) organizations such as the American Liberties Union (ACLU), NAACP, and the National Organization for Women (NOW) do bring class actions. But, in practice, most public interest organizations also have insufficient resources to engage in systematic monitoring of corporate behavior and extensive class action litigation".

In the United States, the so-called “American rule” or “statutory rule” stipulates that each party bears his own litigation expenses, including the compensation for his lawyer.²¹⁵

Nevertheless, fee-shifting rules are provided in several statutes and mostly “serve the public policy of encouraging private enforcement of statutory or constitutional rights”.²¹⁶

In addition, the Rule 11, of the Federal Rules of Civil Procedure, provides for legal ethics and good faith in litigation, establishing sanctions for frivolous representations to the court, which includes the payment of “some or all the reasonable attorneys’ fees” in favor of the movant party.

The test for the “prevailing party” in fee-shifting case was created by Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, as the one that has altered its legal relationship with its adversary through a judgment or consent decree entered by the court.²¹⁷

Although there is a vast literature on the economic analysis of fee-shifting, our assumption advances the subject of the attorney fees for the defendant class lawyer.²¹⁸

Even though it our understanding that defendant-favoring fee-shifting is the optimal mechanism for every defendant class action, our focus is on the analysis of suits where the defendants’ stakes are low, stimulating nuisance value suits brought by plaintiffs.

²¹⁵ See, *Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 247, 249, 250 (1975) (“In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser”. “[t]he general practice of the United States is in opposition [sic] to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute”).

²¹⁶ Cf. MCL, 4th §14.13, 196. Also: “Although, as will be seen, Congress has made specific provision for attorneys’ fees under certain federal statutes, it has not changed the general statutory rule that allowances for counsel fees are limited to the sums specified by the costs statute”. “[a]bsent statute or enforceable contract, litigants pay their own attorneys’ fees”(*Alyeska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 255, 256, 257 (1975)).

²¹⁷ 532 U.S. 598, 604 (2001).

²¹⁸ For a survey of literature on fee-shifting, see, Kathryn M. Christie, *Attorney Fee-Shifting: A Bibliography*, 47 Law & Contemp. Probs. 347 (1984). For empirical studies of fee-shifting, see, Edward A. Snyder and James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J. Law, Econ. & Org. 345, 377 (1990) (arguing that fee shifting encourages parties to litigate); Edward A. Snyder and James W. Hughes, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J. Law & Econ. 225, 249 (1995) (concluding that the English rule likely reduces the frequency of low-merit claims and lessens the overall probability of litigation). For the effect of the different methods of allocation of legal costs on the level of litigation, see, Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55 (1982); Dewees et al., 10 J. Legal Stud. 155 (cited in note 190).

It is considered defendant-favoring fee-shifting, the fee-shifting on a one-way (or one-side) basis, granting fees only to the defendant attorney, when the defendants prevail in the lawsuit, but not awarding fees to the plaintiff's lawyer, even if he wins the case.

The proposed model addresses the problem of motivating the attorney, hence the class representative, to present a defense, instead of just settling with the plaintiff in nuisance value suit. The settlement is the likely solution in this kind of suit, because of the asymmetry between the costs of separate litigation and the settlement offered by the plaintiff due to the absence of the defendant class action. The settlement makes the defendant better off, in separate litigation, but it does not in a collective procedure because the cost of litigation is shared with the members of the class. The aggregation of defendants and the optimal attorney fees award lead to the optimal law enforcement system.²¹⁹

Similarly to contingent fees arrangements on the plaintiff's side, the class counsel in a defendant class action assumes the risk of the litigation.

Consequently, the strategies for the lawsuit are made on the lawyer's assessment of expected gains and losses, so he will only represent the defendants if the expected value of the litigation is positive to him. The investment made by the lawyer equals the compensation he is expecting to obtain with the fees.

The one-side fee-shifting compensates the lawyers' legal services and the loan of such services, with a higher risk of default than ordinary market loan, remaining in cases for many years outstanding without any interest and to be repaid only and if the lawsuit is successful.²²⁰

Although there is not a conclusive analysis, based on empirical studies, about fee-shifting effects on the level of litigation, or, the tendency of going to trial instead of settling the case, or even, the increment of legal expenditures in trial; the use of defendant favoring fee-shifting achieves the collective procedure goals of access to justice and equilibrating the parties to the suit.²²¹

²¹⁹ See the numerical examples in Part IV, B, *supra*.

²²⁰ See, Posner, *Economic Analysis of Law*, 584 (cited in note 24).

²²¹ See, Posner, *Economic Analysis of Law*, 590 (cited in note 24); Shavell, *Foundations of Economic Analysis of Law*, 429-32 (cited in note 25).

In addition, the one-way use of indemnification is socially desirable in order to prevent nuisance value suits. A plaintiff unwilling to go to trial because it would be cost ineffective would refrain from filing a nuisance suit, as stated by Professors Rosenberg and Shavell:

“Under the British system, a plaintiff who would be unwilling to litigate would never file a claim; in particular, *nuisance suits would never occur*” (emphasis added).²²²

The fee shifting system impedes nuisance value suit, since there are no actual economic threats against the defendant, because the judgment in his favor would shift to the plaintiff the costs that the former has incurred retaining a lawyer and other taxable litigation costs.

Of course in circumstances where the plaintiff shows to be judgment-proof, the fee-shifting rule would be inefficient. But this is not a peculiar situation for defendants’ attorneys, as it can happen as well to the plaintiff’s lawyer. The solution would require a security for costs posted in the outset of the lawsuit.²²³

Considering that there is no money changing hands when the defendant prevails, the appropriate scheme to award the class counselor fees is the loadstar method.²²⁴

The court order certifying a defendant class action should appoint the class counsel (Rule 23(c)(1)(B) combined with Rule 23(g)(1)(A)), requiring him to formulate a proposal of fees. The proposal should present an estimate of the number of hours that reasonably should be spent in the lawsuit, and the market value of the hourly charges for lawyers services (Rule 23(g)(1)(C)(iii)).

The advantages of the defendant-favoring fee-shifting system are: (i) overcome the asymmetric costs between separate litigation and collective suit, aggregating the multitude of

²²² Rosenberg and Shavell, 5 *Internat. Rev. Law and Econ.* 3, 5 (cited in note 169). *See, also.* Shavell, *Foundations of Economic Analysis of Law*, 399 (cited in note 25); Lucian Arye Bebchuk and Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and The Role of Rule 11*, 25 *J. Legal Stud.* 371 (1996).

²²³ *See*, Phillip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 *Iowa L. Rev.* 26, 52-3 (1969-1970).

²²⁴ *See*, MCL, 4th, §14.13, 197.

defendants, (ii) compensate the class counsel by equalizing his investment in the litigation with the amount of the fees award; and, (iii) preclude nuisance value suits.

V. Conclusion

In the 21st Century, the idea of “mass society” has deeply evolved. People are living in an information society, where the furnishment of services and goods are made by sophisticated communications links, especially by Internet. These massive and expeditious relationships induce lawful and unlawful behaviors. Therefore, a substantial modification on the law enforcement has to be realized by the law operators and a choice of solutions to be made in order to achieve the optimal enforcement level.

In order to achieve this goal, the ideal model of law enforcement system grants everyone the best well-being, before and after the fact of a given situation, due to optimal deterrence of unreasonable risks, optimal insurance of reasonable risks, and optimal redistribution of wealth by progressively funding the preceding two elements. This theory is based on the individuals’ rational choice of their maximum well-being.

The option is to use mandatory defendant class action because it confers individuals’ maximum well-being, as it takes into consideration the deterrence function of the law as well as its insurance objective. The result is that the ideal of distributive justice is better served, with the procedural law being considered as a tool to achieve the principles enacted in the substantive law.

The mandatory defendant class action permits dispersed individuals to exploit scale of economy and investment in the common defenses in the litigation. Furthermore, the compulsory aggregation of defendants and defenses avoids the threat of nuisance value suits to be brought by a single plaintiff, or even a plaintiffs’ class.

Besides mandatory aggregation of the defendants, the optimal law enforcement system requires optimal incentive to the defendant class counsel.

Differently from the plaintiff’s perspective, a victory in the litigation to the defendant is always a declaratory judgment. The advantage that the lawyer confers upon the defendant class is to impede any money disbursement, or, to establish by the court’s decision that the

plaintiff has no dully rights or claims enforceable against them. Usually, there is not any money to be collected which could be partially used to compensate the lawyer's work.

Consequently, the optimal incentives to the defendant lawyer might be obtained by awarding attorney fees by means of a fee-shifting method.

The specific model proposed is of a defendant-favoring fee-shifting, where the fees are granted only to the defendant attorney, when the defendant prevails in the lawsuit, but no fee is award to the to the plaintiff's lawyer, even if he wins the case.

This method of awarding attorney fees considers the fact that the lawyer is assuming the risk of the litigation. All strategies for the lawsuit are made on the lawyer's assessment of expected gains and losses, so he will only represent the defendants, if the expected value of the litigation is positive to him.

Considering that there is no money changing hands when the defendant prevails, the appropriate scheme to award the class counselor fees is the loadstar method, when the court should require, at the moment of certification of the defendant class and appointment of the counselor, an estimate of reasonable number of hours to be spent in the lawsuit, and the respectively market rate for the legal fees.

The investment made by the lawyer equals the compensation he is expecting to obtain with the fees. The one-side fee-shifting compensates the lawyers' legal services and the loan of such services, with a higher risk of default than ordinary market loan, remaining in cases for many years outstanding without any interest and to be repaid, only and if, the lawsuit is successful.